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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CITED
AND AN INDEX.

BY JAMES B. BLACK,
OFFICIAL REPORTER.

VOL. XXXV.

CONTAINING THE CASES DECIDED AT THE NOVEMBER TERM,
1870, NOT PUBLISHED IN VOLS. XXXIII. AND XXXIV.,
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ALEXANDER C. DOWNEY, LL. D.†
JAMES L. WORDEN, LL. D.
SAMUEL H. BUSKIRK, LL. D.

*Chief Justice at the November Term, 1870.
†Chief Justice at the May Term, 1871.

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Gavin & Hord's Statutes of Indiana cited as 1, 2 G. & H.

Statutes of Indiana, Vol. 3 (Davis' Supplement), cited as 3 Ind. Stat.

For previous decisions of the Supreme Court of this State, overruled, see INDEX, tit. CASES OVERRULED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1870, IN THE FIFTY-FIFTH YEAR OF THE STATE.

MATHER *v.* SCOLES.

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DEMAND.—Where there is a contract to execute a conveyance of real estate, and no time is fixed for the delivery of the conveyance, a demand before suit is instituted is necessary. In such a case the complaint must allege a demand.

SAME.—*Conveyance of Real Estate.*—In general, an action cannot be maintained upon an agreement to convey real estate until after a conveyance has been demanded.

STATUTE OF FRAUDS.—The statute of frauds does not make a contract void, but simply withholds the remedy for its enforcement.

SAME.—*Verbal Contract to Convey Real Estate.*—A complaint upon a verbal agreement to convey real estate, not showing part performance, or that the defendant fraudulently refused to reduce the contract to writing, is bad.

SAME.—*Part Performance.*—Payment of purchase-money is not such a part performance as will take a case out of the statute of frauds.

SAME.—*Alternative Contract.*—A parol agreement in the alternative, to convey land, or, in case of failure to convey, to pay a certain sum of money, is within the statute of frauds, and no action, either to compel a performance, or to recover money, can be maintained upon it.

CONSIDERATION.—Either party to a deed may show, except for the purpose of defeating its operation, the true consideration, although it be entirely different from that expressed in the deed.

CONDITION PRECEDENT.—Where the grantee of lands agrees to convey, in part payment of purchase-money, a tract of land, it is a condition precedent to his right to enforce the contract; and in such a case the complaint must allege a tender of a deed therefor.

SPECIFIC PERFORMANCE.—A party asking the specific performance of a contract must do all in his power to fulfil the contract upon his part.

APPEAL from the Elkhart Circuit Court.

DOWNEY, J.—It is alleged that in this case the circuit court erred, first, in overruling the demurrer to the complaint; second, in sustaining the demurrer to the second paragraph of the answer; third, in refusing a new trial. Scoles was the plaintiff and Mather the defendant in the circuit court.

The complaint alleges that the plaintiff and defendant entered into an agreement, by parol, whereby it was agreed between them that the plaintiff should convey to the defendant certain real estate described in the complaint, of the alleged value of five hundred dollars. In consideration of which, the defendant agreed to pay the plaintiff six hundred dollars cash, and also to procure, at his own cost, the conveyance from one Evans to the plaintiff of certain other real estate, of the value of five hundred dollars, or to pay the plaintiff a sum of money sufficient to procure such conveyance from said Evans; that the plaintiff had conveyed to the defendant the land which, by said contract, he was to convey, but that the defendant had failed to procure from Evans a conveyance of the other land, or to pay to the plaintiff a sum of money sufficient to pay for said land to be obtained from Evans. Prayer for judgment of five hundred dollars damages and other proper relief.

There was a demurrer to the complaint, for want of sufficient facts, which was overruled, and the defendant excepted. It is urged, as an objection to the complaint, that as no time was fixed by the contract when the deed from Evans was to be made, or the money paid in lieu of it, a demand was necessary before suit, and that as none is alleged, the complaint for that reason is bad.

We think this objection to the complaint is well taken. It is not alleged that the defendant had refused to reduce the contract to writing so as to make it binding upon him under the statute of frauds, nor that he refused to perform on the ground that the contract was void because it was not in writing. The statute of frauds does not render a parol contract for the sale of real estate void. It simply withholds the legal remedy upon it. It is only voidable, and not void. *Hadden* v. *Johnson*, 7 Ind. 394. An action cannot be brought on a covenant or agreement to convey real estate, as a general rule, until there has been a demand for such conveyance. *Brown* v. *Hart*, 7 Blackf. 429; *Bowen* v. *Jackson*, 8 Blackf. 203; *Sheets* v. *Andrews*, 2 Blackf. 274.

In the last named case the court say, in speaking of the necessity for a demand in such a case, "It is best calculated to secure the specific execution of contracts, and to prevent a multiplicity of law suits. Besides, it may be often a convenience to the purchaser, for a variety of reasons, not to receive the title as soon as he is entitled to it; and he may therefore prefer its continuance for some time in the vendor. If he can obtain the title to which he has a right, whenever he may choose to demand it, he ought not to complain. There is, indeed, respectable authority for the opinion that it would have been better had the law required a demand previously to a suit, even in case where money only has been contracted for. The law, it is true, as to that has long been settled to be otherwise. But the fact that its policy has been thus questioned, when money alone is to be paid, is a strong ground to show that the rule dispensing with any demand upon the obligor for performance, before a suit against him for non-performance, should not be applied but with great caution to any other contracts than those for the payment of money. We are now well satisfied that it should not be extended to covenants like the one under consideration, for the conveyance of land. An eminent English writer upon this subject says: 'A vendor cannot bring an action for the purchase-money without hav-

ing executed the conveyance or offered to do so, unless the purchaser has discharged him from so doing. And, on the other hand, a purchaser cannot maintain an action for a breach of contract without having tendered a conveyance' (for execution) 'and the purchase-money.' Sugden on Vend., pp. 162 and 163. We are not now called upon for an opinion as to whether the purchaser should pursue the English practice by not only demanding the conveyance, but also by tendering it for execution. It is sufficient, for the present purpose, to say that this suit could not be maintained, unless previously to its commencement the deed had been demanded."

Why it was that Scoles did not insist upon a deed from Evans or Mather at the same time that he executed the deed to Mather, we are not informed; nor do we know, from the allegations in the complaint, when Scoles executed his deed. The covenants or agreements would seem to have been dependent, and yet Scoles executed his deed, leaving the matter with reference to the deed from Evans to be attended to in the future. We think, under these circumstances, under the authority of the cases to which we have referred, that he should have shown in his complaint that he had demanded the deed from Mather, and that he refused to execute it, before the commencement of the action.

This much we say, looking at the case upon the theory of the plaintiff, which proceeds upon the assumption that the agreement of Mather to procure Evans to convey to Scoles was valid and binding and might be the foundation of an action. But was the agreement valid? and can it be made the basis of an action? After giving the matter all the attention which its importance demands, we have been unable to find any satisfactory ground on which the plaintiff can stand. Looking at the complaint as attempting to set up a case for specific performance, it will be readily seen that it cannot be sustained. An agreement for the exchange of land for land is within the statute of frauds as perfectly as a contract for the sale of land. *Rice* v. *Peet*, 15 Johns.

503. And it follows, therefore, that when the agreement to convey is not evidenced by writing, as required by the statute of frauds, there must be the same part performance of the contract in order to exempt it from the operation of the statute, that is necessary to justify the specific performance of a parol contract for the sale of real estate.

The conveyance by Scoles of the land which the complaint alleges he was to convey and did convey to Mather, could be no more than payment of the price which he was to pay to entitle himself to a conveyance from Mather. But it has been long and well settled that payment of the price of land is not alone sufficient part performance to take the case out of the operation of the statute. *Johnston* v. *Glancy*, 4 Blackf. 94. But aside from all this, there could be no specific performance of the contract, for the reason that Mather was not the owner of the land to be conveyed. The title was in Evans, and not in Mather, and Evans was not a party either to the contract or to the suit.

But what is the effect of the statute of frauds upon the contract alleged in the complaint? Our statute provides that no action shall be brought upon any contract for the sale of lands, unless the promise, contract, or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereto by him lawfully authorized. Here the contract was not that Mather himself would convey the land to Scoles, but, as it is alleged in the complaint, that he would procure Evans to do so. Was this a contract for the sale of land within the statute, which, to be binding, must be in writing? We think it was. It is so decided in *Chiles* v. *Woodson*, 2 Bibb, 71; *Parker's Heirs* v. *Bodley*, 4 Bibb, 102; *Griffin* v. *Coffey*, 9 B. Mon. 452; *Hocker* v. *Gentry*, 3 Met. Ky. 463; *Brown, Adm'r*, v. *Jones*, 46 Barb. 400; 4 Amer. Law Reg. (N. S.) 383.

This branch of the contract, by which Mather was to cause Evans to convey the land, being thus void by the statute of frauds, the next question is, what effect does this

have upon the other branch of it, that is, that he would, in default of getting the conveyance from Evans, pay Scoles the sum of five hundred dollars in money? It would seem, at first view, that that part of the contract which was not binding, because not in conformity to the statute, might be rejected, and the party compelled to stand by the other part, which, if it stood alone, would be valid as not being within the statute. The authorities, however, seem to be the other way. Browne, in his work on the statute of frauds, section 152, says, "It is manifest that of such alternative engagements, no action will lie upon that one which, if it stood alone, could be enforced as being clear of the statute of frauds, because the effect of it would be to enforce the other; namely, by making the violation of it the ground of an action."

Suppose the contract assumed such a form that, if it were in writing and sealed, it would be in form a penal bond, obliging the maker of it to convey the land, or in default thereof to pay a sum of money. Can it be held that if the party making the promise fail to convey, which he would not be bound to do in the given case, because the contract, as to that part, is clearly invalid by the statute of frauds, he can be sued for, and compelled to pay the sum of money agreed upon as the penalty which he was to pay in the event that he did not convey the land?

In *Goodrich* v. *Nickols*, 2 Root, 498, the defendant had agreed to sell two parcels of land to the plaintiff, which agreement the parties were to reduce to writing at some future time, and the defendant agreed to convey the land or forfeit and pay to the plaintiff one hundred pounds. The contract was never reduced to writing. The breach alleged was that, although the plaintiff was ready to perform his part of the contract, the defendant had refused to convey the land, whereby he had forfeited the one hundred pounds. The plaintiff offered parol evidence to prove the agreement and promise, which was objected to by the defendant as being within the statute made to prevent frauds and perju-

ries. The court held that the evidence was not admissible; that an agreement to convey land may not be proved by parol evidence, nor may an agreement to forfeit a hundred pounds upon a failure to execute a conveyance pursuant to such agreement be proved by parol.

In *Patterson* v. *Cunningham*, 12 Me. 506, a conveyance had been made, by a father, of certain lands and personal property to his two sons, they orally agreeing that after their father's death they would convey the same property to a sister, or pay her three hundred dollars in money. After the death of the father, the sons having failed to convey the land, the sister sued for the three hundred dollars. It was held by the court that the contract was invalid, under the statute of frauds, and also that the contract, being in the alternative, to pay money or convey lands did not exempt it from the operation of the statute.

These authorities would seem to establish the proposition, that neither branch of the alternative engagement of the defendant was valid, and consequently that no action could be maintained either for damages for not procuring the conveyance of the land or for the recovery of the sum of money which the defendant agreed to pay in the event that he did not procure the conveyance. We are aware of the rule that there may be cases where the stipulations of the party are so separate and distinct that one or more of them may be valid, while the other or others may be void under the statute. But in these cases it seems to be settled that if the suit is upon the entire contract, the party must fail. Browne Stat. of Frauds, sections 150, 156.

The second paragraph of the answer, to which a demurrer was sustained, was not good. It alleges that the true consideration for which the plaintiff conveyed the land mentioned in the complaint to the defendant is stated in the said deed of conveyance, a copy of which is attached to the answer, the same being expressed to be "for the sum of six hundred dollars," wherefore, &c. Either party is at liberty to show for any purpose, except to prevent its operation as

a valid and effective grant, that the consideration of the deed was greater or less than that named in it, or that instead of being money, it was something else. *McMahan* v. *Stewart*, 23 Ind. 590; *Thompson* v. *Thompson*, 9 Ind. 323. The grantor was not estopped from showing that there was another consideration for the deed in addition to the payment of the six hundred dollars mentioned therein. We think the court erred in overruling the motion for a new trial.

The evidence disclosed the fact that in addition to the conveyance of the tract of land which was conveyed to Mather by Scoles, as mentioned in the complaint, Scoles was, by the terms of the same contract, to have conveyed to Mather another small tract, which he had not conveyed. This branch of the contract was entirely overlooked by the framer of the complaint.

The court told the jury, in its instructions, to which there was an exception, that they could deduct the value of this piece of land, not conveyed, from the value of the tract which the defendant had not conveyed, and give the plaintiff a verdict for the difference. This, instead of enforcing the contract which the parties had made, or giving damages for its non-performance, was making for them a new contract. We think the conveyance of the omitted tract, or the tender of a deed for it, if the contract is to be treated as valid for any purpose, was a condition precedent to the right of Scoles to maintain an action for the non-performance of that part of the contract which required Mather to procure the deed from Evans. They must be treated as dependent agreements or stipulations. The appellee attempts to avoid the force of this objection by the citation of authorities in cases for specific performance, but this was not such a case. The action was brought, as at law, on the special contract for the recovery of damages, and the verdict and judgment were for damages. The performance, or tender of performance, of precedent conditions must be alleged and proved. But we do not wish to be understood as conceding that in a

complaint for specific performance it is unnecessary to allege and show the performance of precedent conditions.

Cook v. *Bean, Adm'r*, 17 Ind. 504, was a suit on a promissory note given for purchase-money. The defendant pleaded that a deed for the land was to be made at the time of the payment of the note, and that no deed had been tendered. Reply in denial; trial; evidence establishing the truth of the answer; whereupon the court held the case under advisement till the plaintiff caused a deed to be tendered, and then rendered judgment for the plaintiff. In that case this court said, "This was erroneous. It was like permitting a party to sue on a note before it is due, but suspending judgment until it becomes due and then rendering it against the defendant, thus harrassing him with a suit before he is liable to pay." It is true that a general doctrine is laid down that a specific performance may be enforced where the party is able to perfect title at the rendition of the decree; but that doctrine does not apply to excuse a party from being diligent, from doing all in his power to fulfil his contract; it does not apply to excuse a tender of a deed made a condition precedent to the right to sue. It applies in cases where a party has tendered a deed, given possession, &c., but where some secret defect is discovered in the title, previously unknown, perhaps, to either party. In such case, if the party can cure the defect before decree, judgment will go in his favor.

There was no evidence of the truth of the allegation in the complaint that Mather agreed that he would pay to Scoles the sum of five hundred dollars, or any other sum of money, in the event that he failed to obtain the conveyance from Evans for the land. According to the evidence, the agreement was that he would cause Evans to convey the land, and there was no alternative stipulation.

The appellee may undoubtedly sue for the value of the land conveyed by him, and possibly might rescind the contract, but he cannot recover damages for non-compliance with the special contract for the reasons stated.

The judgment is affirmed, with costs, and the cause remanded.

W. A. Woods and *J. D. Arnold*, for appellant.

A. S. Blake and *R. M. Johnson*, for appellee.

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THE BOARD OF COMMISSIONERS OF LAGRANGE COUNTY *v.* NEWMAN.

PRACTICE.—*Special Finding.*—Where the court upon request finds the facts specially, and there is no exception to the conclusions drawn upon the facts found, no question in regard to said conclusions is presented for the consideration of this court.

SAME.—*Agreement to Submit Questions not Presented by the Record.*—Parties cannot by agreement submit for the consideration of this court any question not presented by the record.

COUNTY TREASURER.—*Allowance.*—The county commissioners cannot defeat the claim of a county treasurer for services rendered upon their request, and in accordance with their direction, by showing that their proceedings were not in conformity with the statute.

APPEAL from the Lagrange Circuit Court.

WORDEN, J.—This was an action by the appellee against the appellants to recover certain fees alleged to be due from the defendants to the plaintiff for services as treasurer of said county. The cause was tried by the court.

The court, at the request of the defendants, found the facts specially, and determined "as a conclusion of law on said facts, that the plaintiff ought to recover from the defendants the sum of seventy-nine dollars and ten cents." Judgment was rendered accordingly, a motion for a new trial being overruled, and exception taken.

The motion for a new trial was correctly overruled, for the reason that the evidence fairly sustained the finding.

The question sought to be presented is whether, on the facts as found by the court, the plaintiff was entitled to re-

cover; or, if entitled to recover something, whether he was entitled to recover as much as the court adjudged upon the facts found. But there was no exception taken to the decision of the court upon the questions of law upon the facts found, as is contemplated by section 341 of the code. 2 G. & H. 207.

We are of opinion that inasmuch as the facts were correctly found by the court, and inasmuch as no exception was taken to the conclusions of law drawn by the court from the facts found, the questions sought to be presented do not legitimately arise in the record.

The parties have agreed, "that the cause shall be submitted and decided upon the true merits, without regard to any defects of record, assignment of errors, or abstracts; and that the questions to be submitted are, first, is the appellee entitled to any fee or compensation for services in borrowing, receiving, and paying out the one thousand four hundred and seventy-three dollars and forty-five cents, borrowed of the National State Bank, and the four hundred dollars borrowed of William Geise? and if so, how much? second, is the appellee entitled to any fee or compensation for receiving and paying out the other items named in the bill of particulars of the complaint of the appellee? and if so, how much? it being admitted as to these items that the special findings are supported by the evidence given in the cause."

We have seen that no question is legitimately presented, by this record, for our consideration, except the correctness of the ruling of the court on the motion for a new trial.

The parties, however, by the agreement above stated, have attempted to present for our determination, certain questions not presented by the record. This is an appellate court, and the agreement of the parties will not be effectual to convert it into a *nisi prius* tribunal.

We decline to enter upon the consideration of the questions not presented by the record, but by the agreement of the parties only.

The judgment below is affirmed, with costs.

ON PETITION FOR A REHEARING.*

DOWNEY, C. J.—In a petition for a rehearing in this case, filed by the appellants, it is insisted that the court "has failed to give an opinion on all the questions presented by the record, and also that the evidence does not sustain the finding of the court below."

The counsel for appellants seem to think that the court has not passed upon the evidence with reference to its "legal effect." But this is a misapprehension. It was solely with reference to its legal effect that we did decide upon it. We hardly see in what other light we could regard it.

In this case the facts are, so far as they need to be noticed in disposing of this petition, that the county was in need of money, and resolved to effect a loan. The board directed that the auditor should issue orders on the treasurer to the persons who were to loan the money, which he did, placing them in the hands of the treasurer, who discounted them, at ten per cent., charging himself as treasurer with the proceeds. In this way he received from one person one thousand four hundred and seventy-three dollars and seventy-five cents, and from another four hundred dollars. In forty-six other items from various sources he received other sums, not in loans, making in all, including the amounts borrowed, three thousand one hundred sixty-four dollars. The claim of the treasurer was for two and a half per cent. for receiving and disbursing this amount. As to the percentage on the money borrowed and paid out, counsel for the appellants insist, that it was not lawful for them to borrow the money for the purpose and in the manner named, and that therefore the treasurer was not legally entitled to charge a percentage on the money. It seems to us that this objection does not come with any grace or force from the appellants. They ordered the borrowing of the money. They prescribed the manner of effecting the loan, and the kind of paper that should be given to the lender. They caused the auditor to

*The opinion on the petition for a rehearing was delivered at the May term, 1871.

draw the warrants on the treasurer, in favor of the lenders, and placed them in the hands of the treasurer, and he, as was contemplated, got the money on them. Now the appellants, the commissioners, propose to defeat the claim of the treasurer by showing a want of conformity to the law in the manner of securing the loan, and in the use to be made of the money. We are asked to make the treasurer's right to compensation turn upon this question. It is claimed by the counsel for the appellants that the loan should have been secured by bonds issued in accordance with 1 G. & H. 251, secs. 17, 18, &c. But we do not regard this effort of the appellants as either just, right, or legal. We therefore regarded the evidence, which shows, very fully, the performance of the alleged services by the treasurer, as sufficient, and as legally sufficient, to sustain the finding of the court. Hence we stated in the above opinion that the facts were correctly found by the court.

The petition for a rehearing is therefore overruled.

A. Ellison and *J. D. Ferrall*, for appellants.

A. A. Chapin, for appellee.

SEEGER *v.* PFEIFER.

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MALICIOUS PROSECUTION.—*Pleading.*—In an action for malicious prosecution the complaint must allege that the prosecution was instituted maliciously and without probable cause.

WITNESS.—*Impeachment.*—A party whose witnesses are impeached by evidence of bad character, or by evidence that they have made statements contrary to the testimony given upon the witness stand, may sustain them by evidence of their general good character for truth and veracity.

INSTRUCTIONS.—*Malicious Prosecution.*—There is a distinction between actions for malicious prosecution and for false imprisonment. In the former it is the duty of the court to instruct the jury, that to maintain the action the plaintiff must prove that the prosecution was malicious and instituted without probable cause.

APPEAL from the Johnson Circuit Court.

DOWNEY, J.—This was an action for a malicious arrest of the plaintiff, in a civil action, brought by the appellee against the appellant in the Bartholomew circuit court, and taken by change of venue to the Johnson circuit court, where there was a trial by jury, and a verdict and judgment for the plaintiff for four hundred dollars.

The first point made is, that the court erred in overruling the defendant's demurrer to the first and second paragraphs of the complaint. It appears that Seeger sued Pfeifer in the common pleas of Bartholomew county, claiming that Pfeifer owed him for money paid as his security for one hundred and fifteen dollars, and for board twenty-four dollars, and on affidavit filed took out a *capias ad respondendum*, and caused him to be arrested and held in custody and put in jail until he gave bail for his appearance. When the case came to be tried, Seeger sustained his case as to the claim for one hundred and fifteen dollars, but not as to the claim for boarding. The answer of the defendant in that case, besides making an issue as to the indebtedness, also took issue on the matters alleged in the affidavit, whether properly or not we need not say; and the court tried these questions with the other issues, and found that there was no sufficient reason for the arrest.

The first paragraph of the complaint in the case at bar, after setting out the commencement of the former action, the suing out of the *capias ad respondendum*, the arrest, giving of bail, &c., alleges that the "imprisonment aforesaid was without lawful, just, or sufficient cause, and was malicious, wrongful, unlawful, and oppressive," &c. The objection to it made by counsel for the appellant is, that it is not alleged that the arrest was "without probable cause."

The second paragraph is as follows: "Second, for further and second count of complaint, plaintiff says that the defendant, at said county, on the sixteenth day of December, 1868, caused said plaintiff to be seized and laid hold of, and to be pulled and dragged about, and then and there caused said plaintiff to be imprisoned, and then and there kept and

detained said plaintiff in prison for a long time, to wit, one day, next following, contrary to law, and under a false and unreasonable color and charge that the plaintiff was about to remove from the State of Indiana, taking with him his property subject to execution, and money and effects, which should be applied to the payment of plaintiff's debts, with intent to defraud said defendant, whereby plaintiff was greatly exposed and injured in his credit, reputation, and circumstances, and was subjected and put to divers expenses, to wit, to the amount of five hundred dollars, in order to obtain, and in obtaining, his liberation from said imprisonment, and was also obliged to find and procure, and did find and procure, bail, to wit, one Frank Pfeifer, as special bail, for said plaintiff in said action, and whereby said plaintiff suffered great anguish and pain of mind, and was prevented from attending to his lawful affairs, all to the damage of plaintiff of ten thousand dollars, for which he sues."

With reference to this paragraph, the appellant contends that "it does not aver that the arrest was malicious and without probable cause." It charges that he was held under a false and unreasonable color and charge, that he was about to leave the State of Indiana, taking with him his property subject to execution, and moneys and effects which should be applied to the payment of defendant's debt, with intent to defraud said defendant, and that he was obliged to procure bail for his discharge. He does not aver he was not arrested upon warrant, but indirectly admits he was arrested in a civil action; and pleadings are always most strongly construed against the pleader. There cannot be any recovery for an arrest in a civil action, without an allegation and proof of malice and want of probable cause.

The distinction between false imprisonment and malicious prosecution is pretty well established. When the arrest is upon valid process issued by a court having jurisdiction, trespass for false imprisonment will not lie, though such arrest is maliciously procured by the prosecutor without probable cause. False imprisonment more especially in civil ac-

tions is sometimes termed in legal language, malicious arrest, and an action for this precise form of injury requires substantially the same allegations and proof of malice and want of probable cause as the action for malicious prosecution. 1 Hilliard on Torts, 217, sec. 22.

We regard both of these paragraphs as attempting to set forth causes of action for malicious arrest, and, according to the rule above laid down, they should have alleged malice and want of probable cause.

To sustain an action for malicious prosecution, it must be alleged and shown that the prosecution was instituted without probable cause and maliciously. *Ammerman* v. *Crosby*, 26 Ind. 451; *Wilkinson* v. *Arnold*, 11 Ind. 45.

No objection is made to the third paragraph, and it seems to us to be a good paragraph for a malicious arrest.

The other points in the case arise out of the motion for a new trial, and the overruling thereof.

One of the defendant's witnesses having been impeached by the plaintiff, by proving that he had elsewhere made statements contrary to what he swore to on the trial, the defendant proposed to sustain the witness by proof that his general character for veracity, in the neighborhood where he resided, was good. This evidence was excluded by the court. The court erred in this. See *Harris* v. *The State*, 30 Ind. 131.

In the instructions the court seems to have adopted an incorrect view of the case, presenting it to the jury as a suit for false imprisonment, and not informing them of the necessity of finding the existence of malice, as well as want of probable cause.

The court, on request by the defendant, refused to tell the jury that the plaintiff, to sustain the action, must show malice and want of probable case, and also refused a charge which, we think, enumerated sufficient facts to show probable cause for the arrest, the existence of which facts, the court was requested to say, amounted to probable cause.

We have, under the assignment of error with reference

to the overruling of the motion for a new trial on the ground of the insufficiency of the evidence, examined the evidence, and are of the opinion that it showed that the appellant had abundant cause for the arrest of the appellee.

The judgment is reversed, with costs.

F. T. Hord, for appellant.

McKee *v.* Anderson and Another.

Attachment.—*Garnishee.*—A. sued B. in a civil action, and also proceeded in attachment. C. was summoned to answer as garnishee. The affidavit alleged that C. "has money in his possession belonging to the defendant, and that as paymaster of" a certain railroad company "he owes the defendant on estimates of work, and now has the money in his possession, which the sheriff cannot attach in this action." Answer in denial.

Held, that a motion for a new trial did not present any question as to the sufficiency of the affidavit.

Same.—*Evidence.*—The admission of a person summoned as a garnishee, that he is indebted to the defendant in the attachment proceeding, will sustain a judgment against him as garnishee.

APPEAL from the Marion Common Pleas.

Downey, J.—The appellees sued Elston and others in a civil action, and in connection therewith took out an attachment and garnished the appellant and others. The only questions in the case relate to the correctness of the proceedings against the appellant as garnishee. The affidavit charges that he "has money in his possession belonging to the said defendants, and that as paymaster of the Indianapolis, Crawfordsville, and Danville Railroad Company he owes the said defendants on estimates of work (and now has the money in his possession), which the sheriff cannot attach in this action."

There was a denial of the allegations of the affidavit, on

which issue the cause was tried by the court, and there was a finding that the garnishee "had in his possession, at the date of the service of summons of garnishment upon him, the sum of eight hundred dollars belonging to said defendants Charles N. Elston and Richard Dickson, and that the same ought now to be applied to the payment and satisfaction of the several claims found due the plaintiffs from said defendants," &c. This amount he was ordered to pay into the hands of the clerk for distribution among the creditors.

McKee moved the court for a new trial on account of the insufficiency of the evidence to sustain the finding, and because it was contrary to law. This motion was overruled. He then moved the court in arrest of judgment, because "no final judgment can be rendered against him for want of proper parties, he being but the agent of B. E. Smith & Co." This motion was also overruled, and final judgment rendered.

The only question made in the assignment of errors and in the brief is upon the refusal of the court to grant a new trial. The overruling of the motion in arrest of judgment is not assigned for error. It is assigned for error that the court erred in overruling the motion of the appellant to dismiss the attachment, but we do not find any mention of such a motion either in the record or in the brief.

The evidence is set out in a bill of exceptions, and is, we think, sufficient to sustain the finding of the court. A number of witnesses testify that McKee said, repeatedly, that he had that amount of money in his hands. We cannot say that any error was committed.

The judgment is affirmed, with five per cent. damages and costs.*

J. E. McDonald, *J. M. Butler*, and *E. M. McDonald*, for appellant.

L. Barbour and *C. P. Jacobs*, for appellees.

* Petition for a rehearing overruled.

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THE CITY OF JEFFERSONVILLE v. THE STEAM FERRYBOAT JOHN SHALLCROSS and Another.

PLEADING.—*Demurrer Waived by Answer.*—A party cannot, at the same time, demur to and answer a complaint. By answering, he waives his demurrer.

FERRY.—*Franchise Lost by Non-User.*—The right of ferriage may be lost by non-user.

SAME.—*Assignee.*—A party who, by non-user, has lost his franchise, cannot transfer any right by conveyance or assignment.

WHARF.—*Right of City to Construct.*—Cities have power to construct wharves and collect wharfage.

SAME.—*Repair.*—The voluntary expenditure of money by a stranger in repairing the wharf of a city will not create a liability against the city.

SAME.—*Duty of City to Repair.*—A city can be compelled to repair her wharves, and may be liable in damages for failure to do so.

SAME.—*Liability of Parties who Use the Wharves.*—A party who uses the wharves of a city cannot defeat the city's claim for wharfage by showing that the wharves are out of repair.

JURISDICTION.—*Claims for Wharfage.*—The state courts have jurisdiction to enforce the collection of claims for wharfage.

SAME.—A claim for wharfage against a domestic vessel is not of admiralty jurisdiction.

PRACTICE.—*Judgment.*—Where the evidence is in the form of an agreed statement of facts, and there is no reason for another trial, the Supreme Court will pronounce judgment without remanding the case for trial.

APPEAL from the Clark Circuit Court.

DOWNEY, J.—This was an action by the appellant to recover for the use of the wharf, at said city of Jeffersonville, by said steam ferryboat, in carrying passengers, &c., between Jeffersonville, Indiana, and Louisville, Kentucky. The suit was commenced before the mayor of the city of Jeffersonville, where there was judgment for the plaintiff, and the said boat having been attached and released on account of a bond having been filed, there was judgment by default against the ferry company, but no order for the sale of the boat. The process had been served on the captain of the boat, on one of the owners thereof, and the treasurer and acting superintendent.

The company appealed to the circuit court. The case having ended in the circuit court in a judgment for the de-

fendants, came to this court, and can be found reported on page 100, 27 Ind. On its return to the circuit court, the demurrer to the fourth paragraph of the answer was sustained, the second and third paragraphs were withdrawn, and a demurrer to the complaint filed by the defendants, alleging that the complaint did not state facts sufficient to constitute a cause of action, was filed and overruled, and the defendants excepted. The defendants then refiled the second and third paragraphs of the answer. The plaintiff demurred to these paragraphs of the answer, the demurrer was overruled, and the plaintiff excepted. There was a reply by the denial of the second and third paragraphs of the answer. Trial by the court, on an agreed statement of facts; finding for the defendants; motion for a new trial overruled; and judgment for the defendants. Several errors are assigned by the appellant, and cross errors are assigned by the appellees.

The first question made by the appellant is, that the complaint is insufficient. The plaintiff insists that as the first paragraph of the answer was not withdrawn with the second and third, but was on file when the demurrer to the complaint was filed and passed upon, the demurrer was rightly overruled, for this reason, if for no other, that a party cannot plead and demur at the same time.

This court held, in *Hosier* v. *Eliason*, 14 Ind. 523, that "a party cannot demur and answer to the merits at the same time to the same paragraph. Hence, when this is attempted, either the demurrer or answer must give way. The rule is, in such case, that the answer overrules the demurrer and puts it out of the case." Following this rule, we must regard the demurrer as out of the case; and as there is no assignment of error alleging the insufficiency of the complaint, no question with reference to that is before us.

The next question in chronological order relates to the sufficiency of the second and third paragraphs of the answer. They are the same that the court held to be sufficient when the case was in this court before, and that were then

disposed of as reported in 27 Ind., *supra.* We are not inclined to overrule the ruling of this court on this point as there expressed, though these paragraphs of the answer might be more satisfactory to us than they are.

The appellee complains of the ruling of the circuit court in sustaining the plaintiff's demurrer to the fourth paragraph of the answer. This was done in accordance with the mandate of this court, made when the case was here before, and we approve that ruling.

The next question is as to the correctness of the ruling of the circuit court in overruling the motion of the plaintiff for a new trial.

The claim of Bowman and of his devisees to a ferry franchise at the place in question was fully considered, on substantially the same facts as in this record, in the case of *Bowman's Devisees* v. *Wathen*, 2 McLean, 376, and in the same case on appeal to the Supreme Court of the United States, 1 How. 189. It was held in that case, in those courts, that the supposed ferry right of Bowman and his devisees had been utterly lost by non-user, and in consequence of the exercise of an adverse right by other parties. The case was decided by judge McLean in 1841, and it was affirmed by the Supreme Court of the United States in 1843. Long after this, in 1854, the defendants became the purchasers of this pretended right. It seems to us to follow, irresistibly, that if the right of Bowman and his devisees had been lost as above stated, the defendants acquired nothing by their alleged purchase of that right, and that their right to a ferry and to the free use of the wharf, if they have any, must rest upon other grounds than that which is furnished by that purchase.

The defendants or those under whom they claim are the same persons who contested the Bowman ferry claim set up in the case in 2 McLean and 1 Howard, *supra*, and prior to the time of that litigation and ever since they have maintained said ferry under licenses issued to them under the statutes of the State of Indiana.

The evidence shows that the part of the wharf used by the boats of the ferry company was constructed by, and at the cost of, the city, and that considerable sums had been expended by the city in keeping it in repair, a part of the amount thus expended by the city having been paid by the defendants in compromise and settlement of a former claim made against them by the city for wharfage. Also, that a considerable amount had been expended by the defendants in repairs of the wharf at the approaches to their ferry landing. Much of the money expended by the ferry company appears to have been expended under an agreement with the city, and not in consequence of any ownership of the wharf claimed by them. Part of the amount expended was paid out after this suit was brought. There is no evidence that any money was expended by the ferry company, on the wharf, at the request of the city, unless it may have been that paid or expended by it under the agreement of compromise referred to.

There is no evidence that the ancient Bowman ferry, which is referred to, was ever established or used.

There is no evidence that the ferry company owns any part of the wharf or any interest in it.

This court decided in this case when here before, that the fact that the city had failed to keep the wharf in good repair did not prevent her from collecting wharfage, and that the voluntary expenditure of money by the ferry company did not create any liability on the part of the city.

The statute in force at that time, and yet in force, provides that the city council shall have power "to establish and construct wharves, docks, piers, and basins, and to regulate landing places, and fix the rates of landing, wharfage, and dockage, and provide for the appointment of harbor and wharf masters and port wardens; all claims for landing, wharfage, and dockage accrued to said city shall be a lien upon the boat, vessel, or water craft, contracting the same, and after a demand made by the wharf master upon the owner, master, clerk, or consignee thereof, and refusal of

payment, may be enforced by attachment before the mayor of such city, when the amount does not exceed one hundred dollars, in the same manner and to the same extent that liens on boats and other water crafts are now enforced under the general laws of this State, and all the proceedings shall be conformable thereto as far as practicable."

The ordinance passed by the city council and made part of the complaint provides for the appointment of a wharf master, fixes the place of landing of the boats of the ferry company, and the rate of wharfage which they shall pay.

The remaining question has reference to the jurisdiction of the state courts. It is claimed that the subject is exclusively cognizable in admiralty. It is well settled that a claim for wharfage against a domestic vessel is not of admiralty jurisdiction, whatever may be the case with reference to others. *The Phebe*, Ware, 360; *George B. Russel* v. *The Asa R. Swift*, Newb. 553; *Ex parte Lewis*, 2 Gallis. 483. There is no evidence to show whether the boat, in this case, was or was not a domestic vessel. We are not required to presume that she was a foreign vessel, and that therefore the state court had no jurisdiction.

As the evidence in the case is in the form of an agreement of the facts, and as there seems to be no reason for another trial in the circuit court, the judgment is reversed, with costs, and the cause is remanded, with instructions to the circuit court to render judgment for the plaintiff for the amount claimed, twenty-seven dollars, and for the sale of the boat, &c., with costs.*

M. C. Kerr, *W. J. Hisey*, and *S. S. Johnson*, for appellant.

T. W. Gibson, *J. E. McDonald*, *J. M. Butler*, and *E. M. McDonald*, for appellees.

*Petition for a rehearing overruled.

McFadden and Another *v.* Robison.

Sale.—*False Representations.*—Complaint on a promissory note. Answer in several paragraphs, the third alleging that the note was obtained by fraud. Upon the trial, the court instructed the jury as follows: "The defendants in the third paragraph of their answer set up, in substance, that the note sued upon was obtained through the fraud and false representation of David W. Champer, the assignor of said note, in this, that the same was given in part consideration of a stock of dry goods purchased by defendants, McFaddens, of the said Champer; that said Champer at the time falsely represented said goods to have cost him five hundred dollars more than same did cost him; that defendants relying wholly on said representation, executed the note. You will inquire whether said assignor made said representation. If you find he did not, that would end your inquiry so far as this plea is concerned. Your finding, then, on this plea would be for plaintiff. But if you find he did make the representation, then you will inquire further whether said representation actually misled the defendants. If the goods were before the defendants, so that they could examine them and had the means at hand to ascertain the value of the goods, but negligently relied upon the said representation of said assignor, as to the value, then they could not maintain this defense."

Held, that this was error, because if the defendants could have seen and inspected the goods, it would not have enabled them to know or ascertain their cost.

APPEAL from the Wells Common Pleas.

Pettit, C. J.—Appellee, as assignee of one Champer, brought suit against the appellants on a promissory note. The answer was in four paragraghs. First, Want of consideration. Second, Partial failure of consideration; that the note was given in part payment for a stock of dry goods, and that there were not so many goods as it was supposed there were and as represented to be. Third, That the note was obtained through the fraud and artifice of the payee of said note, in this, that defendants purchased of said payee a stock of dry goods, which the payee agreed to let defendants have at cost; that well knowing that defendants would rely upon the representations of said payee as to the cost of the same, and for the purpose of cheating and defrauding

defendants, he represented said goods to have cost him five hundred dollars more than the same did cost him; that defendants, relying wholly upon said representations, did execute said note in part consideration of the purchase-money of said stock of goods. Fourth, counter claim, that the payee agreed with defendants that in consideration of the sum of thirty-five hundred and seventy-five dollars, paid and to be paid by defendants, he would convey and transfer to them a stock of goods of the value of three thousand five hundred and seventy-five dollars; that in consideration thereof defendants paid said payee certain moneys and gave their certain promissory notes, one of which is the one sued upon; that said payee, disregarding his agreement, failed to convey and transfer a stock of goods of said value, but only of the value of two thousand five hundred dollars.

Reply of general denial was filed to all of these paragraphs. Trial by jury, and verdict for the plaintiff; motion for a new trial overruled, and exception; judgment on the verdict, and appeal to this court. The evidence is all in the record, and tends to prove both sides of the issues, but, we think, much stronger on the part of the plaintiff than the defendants. The only point made or presented in the appellants' brief, for a reversal, is the giving the instructions of the court to the jury, which are as follows:

"The defendants, in the third paragraph of their answer, set up, in substance, that the note sued on was obtained through the fraud and false representations of David W. Champer, the assignor of said note, in this, that the same was given in part consideration of a stock of dry goods purchased by defendants McFaddens of said Champer; that said Champer at the time falsely represented said goods to have cost him five hundred dollars more than the same did cost him; that defendants, relying wholly on said representation, executed the note. You will inquire whether said assignor made said representation. If you find he did not, that would end your inquiry, so far as this plea is concerned. Your finding, then, on this plea would be for

plaintiff; but if you find he did make the representation, then you will inquire further, whether said representation actually misled the defendants. If the goods were before the defendants so that they could examine them, and had the means at hand to ascertain the value of the goods, but negligently relied upon the said representation of said assignor as to the value, then they could not maintain this defense. If the jury do find the facts stated in the fourth paragraph of answer, still they are not to find for the defendants, if at the time that the representations in said answer mentioned were made, the defendants had the means of ascertaining the truth of the matter by diligent examination."

These instructions were all right and proper, except the first one to the third paragraph of the answer, which was erroneous. The third paragraph states "that the note was obtained through the fraud and artifice of the payee of said note, in this, that defendants purchased of said payee a stock of dry goods, which the payee agreed to let defendants have at cost; that well knowing that defendants would rely upon the representations of said payee as to the cost of the same, and for the purpose of cheating and defrauding the defendants, he did represent said goods to have cost him five hundred dollars more than the same did cost him; that defendants, relying wholly upon said representations, did execute said note in part consideration of the purchase-money of said stock of goods." The latter clause of the instruction upon this paragraph is, " if the goods were before the defendants so that they could examine them, and had the means at hand to ascertain the value of the goods, but negligently relied upon the said representations of said assignor as to the value, then they could not maintain this defense."

This was an erroneous instruction. The representations were, that the payee would let the defendants have a stock of goods at cost, but did not do so, taking five hundred dollars more than cost for them. If the goods had been before the defendants with full power and consent to learn, know,

and ascertain their full value, this would not have enabled them to know the cost of the goods, or to know whether they were purchasing them at cost.

The judgment is reversed, at the costs of the appellee, with instructions for further proceedings not inconsistent with this opinion.

WORDEN, J., having been of counsel, was absent.

J. L. Worden, *J. Morris*, and *W. H. Wethers*, for appellants.

COX *v.* VICKERS and Another.

REDEMPTION.—*Party.*—To cut off the right of an owner of an equity of redemption to redeem, he must be made a party to the suit to foreclose. (PETTIT, C. J. dissents, holding that the statute of June 4th, 1861, takes away all rights to redeem except as provided in that statute.)

ESTOPPEL.—To constitute an estoppel, it must appear that the party insisting upon it parted with some right or invested money upon the faith of the acts of the other party.

PRACTICE.—*Judgment, Non Obstante Veredicto.*—Where a general denial is pleaded, it is error to sustain a plaintiff's motion for judgment, *non obstante veredicto.*

SAME.—*Open and Close.*—The plaintiff is entitled to open and close in all cases where the defendant answers the general denial.

APPEAL from the Clay Common Pleas.

DOWNEY, J.—This was an action by Cox against the defendants, Vickers and Vickers, to be allowed to redeem certain lands described in the complaint.

The complaint is in one paragraph, and alleges that on the 15th day of March, 1866, one Branson H. Boling was the owner of certain lands therein described; that there was a

mortgage on the land to secure one hundred and fifty dollars, executed to the defendant Addison B. Vickers; that on the 15th day of March, 1866, Boling conveyed the land in complaint described by warranty deed to the plaintiff; that after the conveyance to the plaintiff, the defendant Addison B. commenced his suit against Boling and wife alone to foreclose said mortgage, and on the 2d day of the November term, 1866, of the common pleas, took judgment against Branson H. Boling for one hundred and thirty dollars and sixty cents and for foreclosure against him and his wife; that plaintiff was not made a party to said suit and had no notice of the pendency of the same; that on the 5th day of January, 1867, Addison B. Vickers assigned the judgment to Elijah Vickers; that after said assignment Elijah sued out a copy of decree or judgment, and on the 19th day of October, 1867, caused the land to be sold, and bid the same in for the sum of forty dollars; that at the time of the foreclosure and ever since, the plaintiff was the owner of the equity of redemption in said lands, of which fact both the defendants had full notice before the time they commenced the suit to forclose the mortgage; that the land is worth a thousand dollars; and that defendants refuse to allow him to redeem the same. Prayer, that the sale be set aside, and that plaintiff be permitted to pay the money into court and redeem the land, or that a new sale be ordered, and for general relief.

The deed from Boling and wife to Cox, the mortgage from Boling and wife to Addison B. Vickers, the copy of the decree of foreclosure, the copy of the assignment of judgment, the copy of decree on which the land was sold, together with the sheriff's return thereon endorsed, are filed with the complaint and made part thereof.

Defendants filed demurrer to the complaint, alleging for cause, first, that the same does not state facts sufficient to constitute cause of action; second, want of jurisdiction; third, defect of parties; fourth, misjoinder of parties defendants. The demurrer was overruled, and an exception taken.

The defendants then answered, first, the general denial; second, that on the — day of January, 1865, Boling and wife executed the mortgage, a copy of which is filed with the complaint, to Addison B. Vickers; that after the execution of the mortgage, Boling and wife conveyed the land in controversy to Cox; that Cox at the time of the conveyance had full notice of Vickers' mortgage; that Cox bought the property subject to the mortgage, and agreed to pay out the debt to Vickers as part of the consideration for the conveyance; that Cox failed to perform his agreement, and suffered said mortgage to be foreclosed, and stood by and consented to said foreclosure, as well as the sale of sheriff made thereon, and the deed executed on said sale, and after the expiration of a year, during all the time, Cox stood by and consented, with a full knowledge of all the facts as to all things done in the premises; that said Boling has all the time been insolvent; that defendants only realized forty dollars on the sale of the mortgaged premises, leaving the balance of their claim unsatisfied, and which balance Cox, although often requested, has failed to pay. Prayer, that the proceedings in foreclosure be affirmed, and for judgment against Cox for two hundred dollars, and that the court refuse to allow him to redeem.

The plaintiff filed a demurrer to the second paragraph of this answer, alleging for cause, first, that said answer did not state facts sufficient to entitle the defendant to the relief prayed; second, that there was a defect of parties.

The demurrer to the second paragraph of the answer was overruled and excepted to by the plaintiff. The plaintiff then replied to the second paragraph of the answer by general denial.

The cause was tried by a jury, who found a general verdict for the defendant, together with answers to interrogatories propounded by the defendants.

At the proper time, the plaintiff asked leave to commence the evidence, which the court refused, and allowed the de-

fendants to commence, to which the plaintiff at the time excepted.

At the proper time, the plaintiff asked leave to open and close the argument to the jury, which the court refused, and allowed the defendants to open and close the argument, to which the plaintiff at the time excepted.

Upon the return of the verdict, the plaintiff moved the court for judgment on the pleadings, notwithstanding the verdict, which motion was overruled and excepted to by the plaintiff.

The plaintiff moved for a new trial, first, because the court erred in overruling the plaintiff's demurrer to the defendants' answer; second, the court erred in overruling the plaintiff's motion for judgment on the pleadings; third, the court erred in refusing to allow the plaintiff to open and close the evidence and argument to the jury; fourth, the court erred in instructing the jury of its own motion as in instructions numbered two and three; fifth, the court erred in admitting evidence, &c.; sixth, the verdict is not sustained by the evidence; seventh, the verdict is contrary to the evidence; eighth, the verdict is contrary to law; ninth, the court erred in refusing instructions numbered one and two asked by the plaintiff.

The court overruled the motion for a new trial and rendered judgment on the verdict for the defendants.

The errors assigned are, first, the court erred in overruling the demurrer to the second paragraph of the answer; second, in refusing judgment for the plaintiff on the pleadings; third, in overruling the motion for a new trial.

The second paragraph of the answer was no defense to the action. The plaintiff, who was the owner by conveyance from Boling and wife of the equity of redemption, not having been made a party to the suit to foreclose the mortgage, was not in any way affected by the judgment. He had precisely the same right to redeem, therefore, that he had before the rendition of that judgment. If it had been desired to cut off his right to redeem, he should have been made a

party to the suit. We hardly deem it necessary at this day to cite authorities in support of this position. The allegation in the second paragraph of the answer with reference to the "standing by" of Cox, cannot render the answer good. It is not alleged that the defendants did not know of his claim to the property. It is not shown that they invested any money or parted with any right in consequence of his alleged silence. There are none of the qualities of an estoppel in the transaction. The court should have sustained the demurrer.

This renders it unnecessary for us to decide the question raised by the second assignment of error. But we may say that as the general denial was also pleaded, we think it was not error for the court to refuse to render judgment for the plaintiff on the pleadings, *non obstante veredicto.*

The court erred in refusing to allow the plaintiff to have the open and close. The general denial being in, it was essential for the plaintiff to prove the truth of the allegations in his complaint, and this gave him the right to open and close.

We think that some of the instructions of the court to the jury based on the theory of the case set up in the second paragraph of the answer were incorrect.

The motion for a new trial should have been sustained.

The judgment is reversed, and the cause remanded. Costs to the appellant.

PETTIT, C. J., dissents, because he holds that the statute of June 4th, 1861, takes away all right to redeem, except as provided for in that statute.

W. W. Carter and *S. D. Coffey*, for appellant.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1871, IN THE FIFTY-FIFTH YEAR OF THE STATE.

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SHUMAKER *v.* JOHNSON.

MARRIED WOMAN.—*Conveyance.*—A conveyance by a married woman, her husband not joining therein, is absolutely void, not only as a conveyance, but as a contract or agreement to convey, and vests no right or equity in the grantee.

SAME.—H., a married woman, without her husband joining, made a deed for certain real estate to S., who was also a married woman, and her infant son. Afterwards S. and her husband conveyed the same real estate to J.

Held, that S. and her husband had no title or equity to the premises, and hence nothing passed by their deed to J.

SAME.—*Estoppel.*—A deed made by a married woman, her husband joining with her, purporting to convey nothing but their interest in the premises, whatever that interest might be, without defining the character of the interest, or affirming that they had an interest in the premises, will not estop her from setting up an after-acquired title to the premises.

APPEAL from the Hendricks Circuit Court.

WORDEN, J.—This was an action by the appellee, William H. Johnson, against the appellant, Martha Shumaker, and others, to recover possession of certain real estate, and to quiet the plaintiff's title thereto. Prayer, also, that if James

Shumaker, one of the defendants, should be found to be a tenant in common with the plaintiff, partition might be had by order of sale, as the premises were not susceptible of division. Trial by the court, and finding that the plaintiff and said James were tenants in common of the premises; that the premises were not susceptible of division; and judgment that the property be sold, &c.

Martha appeals. The questions arising in the record are duly preserved by exceptions.

There is not much, if any, controversy about the facts in the case; and they are, in substance, as follows:

On the 29th of March, 1865, Charity Hudson, being then a married woman, was the owner of the land in controversy. On that day, for a valuable consideration, paid her by Martha Shumaker, the appellant, Mrs. Hudson, alone and without being joined by her husband in the deed, executed a conveyance of the premises to Mrs. Shumaker and her infant son James Shumaker. The money paid Mrs. Hudson by Mrs. Shumaker was the money of the latter that had come to her from the estate of her father. At the time of the execution of this conveyance, William Hudson, the husband of Charity, was living with her, in Hendricks county. By virtue of this conveyance, Mrs. Shumaker was put in possession of the premises.

On the 7th of June, 1869, Martha Shumaker and her husband, by a deed duly executed, conveyed and quitclaimed to the appellee Johnson their entire interest in the premises, for the consideration of two hundred dollars. One hundred dollars of this purchase-money was paid down, and Johnson executed to Martha his note for the residue, on which he has paid the interest, which she retains.

On the third of September, 1869, Charity Hudson and William, her husband, in order to carry out the original contract of sale and purchase between Charity and Martha, executed a warranty deed of the premises to Martha. These are the essential facts; and on them we think there should have been a finding and judgment for the appellant.

The first inquiry that naturally arises in the case is,

whether any right, title, or interest passed by the deed from Mrs. Hudson to Martha and James Shumaker. This must be answered in the negative. Mrs. Hudson being a married woman, her conveyance, her husband not joining therein, was absolutely void, not only as a conveyance, but as a contract or agreement to convey. *Stevens* v. *Parish*, 29 Ind. 260. The deed in question not only did not vest any title in Martha and James Shumaker, but it did not vest any right or equity in them that the law could in any manner enforce. *Baxter* v. *Bodkin*, 25 Ind. 172.

Mrs. Shumaker having no title or equity in the premises, she could convey none to Johnson, although her husband joined her in the deed. The deed from Mrs. Shumaker and her husband to Johnson purports to convey to him only their interest in the premises; and as they had no interest, either legal or equitable, nothing, of course, passed by the deed.

Up to the time of the conveyance by Mrs. Hudson and her husband to Martha Shumaker, the title to the premises, both legal and equitable, remained in Mrs. Hudson; and that title passed by this deed to Mrs. Shumaker. The title thus conveyed to Mrs. Shumaker still remains in her, unless it passed to Johnson, on the principle of estoppel, by virtue of her former deed to him, executed in conjunction with her husband.

It has been held in a large number of cases, that, as a general rule, a deed with covenants of warranty will pass to the grantee a title subsequently acquired by the grantor; and this is sometimes, though not always, put upon the ground of avoiding circuity of action. Rawle on Cov., 3d ed., 410, *et seq.*

But it is insisted by the appellant that the principle can have no application to this case, because, first, there are no covenants in the deed from Mrs. Shumaker and her husband to Johnson, and, second, Mrs. Shumaker being a married woman at the time of the execution of the deed, she could not be bound by any covenants, and, consequently, could not be estopped by them.

It is, perhaps, not advisable to discuss at any length the question whether a married woman is thus estopped by her covenants, inasmuch as that question is not presented by the case under consideration. It may be observed, however, that the authorities on this point are not entirely harmonious. *Vide* cases collected in Rawle, 433; also *Jackson* v. *Vanderheyden*, 17 Johns. 167; *Wight* v. *Shaw*, 5 Cush. 56; *Aldridge* v. *Burlison*, 3 Blackf. 201, and notes. Our statute provides, that "the joint deed of the husband and wife shall be sufficient to convey and pass the lands of the wife, but not to bind her to any covenant therein." 1 G. & H. 258, sec. 6. Perhaps it may be concluded that, under this statute, a married woman is not estopped by her covenants, considered merely as covenants. Whether she might not be estopped, in a proper case, on principles hereafter stated, we need not determine.

We have seen that the deed from Mrs. Shumaker and her husband to Johnson simply purports to convey to the latter "their entire interest" in the premises. It does not purport to convey any particular interest or estate, nor does it in any manner affirm that they have any interest or estate in the premises, either particular or general. In such case, though there were covenants in the deed, and though Mrs. Shumaker were not laboring under the disability of coverture, the authorities establish the proposition that she is not estopped by the conveyance.

We quote a passage from the author above cited: "There is still another qualification to the doctrine of estoppel being caused by the covenant of warranty, which is that where the deed does not, on its face, purport to convey an indefeasible estate, but only 'the right, title, and interest' of the grantor, even although the deed may contain a general covenant of warranty, yet, in cases where that covenant is held to be limited and restrained by the estate conveyed and not to warrant a perfect title, the doctrine of estoppel has been held not to apply; in other words, although a warranty is invested with the highest functions of an estoppel, in passing, by mere opera-

tion of law, an after-acquired estate, yet it will lose that attribute when it appears that the grantor intended to convey no greater estate than he was possessed of." Rawle, 417, 418.

The law of estoppel arising from conveyances was very fully considered by the Supreme Court of the United States in the case of case of *Van Rensselaer* v. *Kearney*, 11 How. 297, and the doctrine there settled that will go far towards reconciling many of the decisions that are in apparent conflict. Mr. Justice NELSON, in delivering the opinion of the court, says, "The general principle is admitted, that a grantor, conveying by deed of bargain and sale, by way of release or quitclaim of all his right and title to a tract of land, if made in good faith and without any fraudulent representations, is not responsible for the goodness of the title, beyond the covenants in his deed. * * A deed of this character purports to convey, and is understood to convey, nothing more than the interest or estate of which the grantor is seized or possessed at the time, and does not operate to pass or bind an interest not then in existence. The bargain between the parties proceeds upon this view; and the consideration is regulated in conformity with it. If otherwise, and the vendee has contracted for a particular estate, or for an interest in fee, he must take precaution to secure himself by the proper covenants of title. But this principle is applicable to a deed of bargain and sale by release or quitclaim, in the strict and proper sense of that species of conveyance. And therefore, if a deed bears on its face evidence that the grantors intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted; at least as far as to estop them from ever afterward denying that he was seized of the par-

ticular estate at the time of the conveyance." After citing and discussing many authorities, the opinion proceeds as follows: "The principle deducible from these authorities seems to be, that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument by way of recital or averment that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies. The reason is, that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him, in good faith and fair dealing, should forever thereafter be precluded from gainsaying it."

We have quoted largely from the opinion in this case, because it puts the estoppel upon quite different ground from that assumed in many of the cases, and assimilates the principles that govern it to those governing ordinary estoppels *in pais*. The estoppel, in this view, is not made to depend upon the presence or absence of covenants. Perhaps a married woman who executes a deed with covenants, say the covenant of seizin, or our statutory warranty, although not bound by the covenants as such, would be estopped on the principles above enunciated. We, however, intimate no opinion on the question.

We think it to be quite clear from the foregoing authorities, that such a deed as was executed by Mrs. Shumaker and her husband to Johnson, purporting to convey nothing but their interest in the premises, whatever that interest might be, without any affirmation as to the character of the

interest, or that they had any interest in the premises, cannot estop her from setting up her after-acquired title.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to proceed in accordance with this opinion.

C. Foley, for appellant.

W. A. McKenzie, for appellee.

THE JEFFERSONVILLE, MADISON, AND INDIANAPOLIS R. R. CO. *v.* GENT and Others.

MISJOINDER.—A cause cannot be reversed for error in overruling a demurrer for misjoinder of causes of action.

PLEADING.—In a suit against a common carrier, for failure to deliver goods, the complaint must show that after the carrier received the goods to be transported, a reasonable time had elapsed, in due course of transportation, for the delivery of the goods, before the demand was made; and also that the defendant's reasonable freights and charges have been paid or tendered, or a reason given for not having done so.

APPEAL from the Bartholomew Circuit Court.

PETTIT, J.—Thomas Gent, Thomas Gaff, and James Gaff, partners as Thomas Gent & Co., complain of the Jeffersonville, Madison, and Indianapolis Railroad Company, and say that the defendant is a corporation and a common carrier of goods for hire; that the plaintiffs, at the request of defendant, caused to be delivered to defendant diverse goods, that is to say, one hundred barrels of flour of the plaintiff's to be carried by the defendant in and by certain cars of the defendant from Columbus to Indianapolis, in said State, and there to be delivered to the plaintiffs, for freight and reward in that behalf; that the defendant then and there gave to plaintiffs a bill of lading, a copy of which is filed herewith, and the defendant there received the same for the purpose

aforesaid; that afterwards, to wit, on the —— day of ——, 1867, the plaintiffs at Indianapolis, aforesaid, demanded said goods from defendant, but defendant did not deliver said goods to plaintiffs, but then and there failed and refused to do so. They aver that said goods were then and there of the value of fifteen hundred dollars.

The plaintiffs further complain of defendant, and say that defendant is a corporation and is a common carrier of goods for hire from Columbus to Indianapolis, in said State; that the defendant converted to its own use and wrongfully deprived the plaintiffs of the use and possession of the plaintiffs' goods; that is to say, one hundred barrels of flour, of the value of fifteen hundred dollars, which the plaintiffs had delivered to the defendant as a common carrier aforesaid, and which it had received as such carrier, to be carried by it for the plaintiffs, for reward in that behalf.

Wherefore plaintiffs demand judgment for fifteen hundred dollars.

To this the defendant demurred for misjoinder of causes of action, and to each paragraph severally for want of sufficient facts being stated therein to constitute a cause of action. The demurrers were overruled and exceptions taken to the ruling, and this is assigned for error.

Whether right or wrong, we cannot reverse for the ruling on the misjoinder of causes of action. 2 G. & H. 81, sec. 52.

The court erred in overruling the demurrer to the first paragraph of the complaint, and for this error the judgment must be reversed.

The averments of the first cause of action are substantially, that the plaintiffs delivered to defendant, at Columbus, one hundred barrels of flour, to be, by the defendant, transported by rail to Indianapolis, for freight and reward to be paid to defendant by plaintiffs; that thereafter, to wit, on the —— day of ——, 1867, plaintiffs demanded the goods of defendant, at Indianapolis, but the defendants then and there refused to deliver the same to plaintiffs.

There is no averment as to the day when the flour was

delivered to defendant at Columbus, except as shown by the bill of lading, and there is no averment fixing the time when the demand was made at Indianapolis. The allegation is simply, that afterwards, to wit, on the —— day of ——, 1867, the demand was made. The pleading must be construed most strongly against and most unfavorably to the pleader. There is nothing in the pleading to preclude the idea that the demand at Indianapolis was made the next hour or the next day after the delivery at Columbus, before the flour had been or could have been transported to Indianapolis, in a reasonable time after its delivery, in due course of railroad transportation; and if the flour had not been received at Indianapolis, when the demand was made, for the reason that a reasonable time for its transportation had not elapsed, the refusal of the defendant's agents at Indianapolis to deliver it fixed no liability upon the company.

The pleading, to be good, ought, we think, to show either that the flour had been transported to Indianapolis when the demand was made, or that sufficient time had elapsed for its transportion, or that the flour had been converted by the defendant to its own use.

There is another fatal objection to this cause of action in our judgment; common carriers have a right to hold goods transported by them until their reasonable freights and charges are paid.

There is no allegation that the defendant's reasonable freights and charges had been paid or tendered to defendant, nor is any reason or excuse given for not having done so. Under the averments of the pleading the defendant had a perfect right to hold the flour, even though it had been received at Indianapolis, until the charges for the transportation thereof had been paid or tendered.

Story on Bailments lays down the law as follows, secs. 585 and 588: "In virtue of the delivery of the goods, carriers acquire a special property in them, and may maintain an action against any person who displaces that possession or does any injury to them. This right arises from their

general interest in conveying the goods, and their responsibility for any loss or injury to them during their transit. And, having once acquired the lawful possession of the goods for the purpose of carriage, the carrier is not obliged to restore them to the owner again, even if the carriage is dispensed with, unless upon being paid his due remuneration; for by the delivery he has already incurred certain risks. The carrier is also entitled to a lien on the goods for his hire (and his advances to others for freight and storage), and is not compellable to deliver them until he receives it, unless he has entered into some special contract, by which it is waived." See, also, secs. 107 and 120.

The demurrer to the second paragraph of the complaint was properly overruled. That paragraph charges a conversion of the goods, and in such case the carrier is not entitled to have a demand made for the goods of him or payment of the freight charges to him, before suit brought. Chitty on Carriers, 91, 131; *Robinson* v. *Skipworth*, 23 Ind. 311. See p. 315. Story on Bailments, sec. 107.

This decision renders it unnecessary for us to notice any rulings of the circuit court which subsequently took place, for had the demurrer been sustained to the first paragraph of the complaint, the pleadings and after issues and rulings might have been very different from what they are, and cannot, therefore, be considered as properly arising in the record.

The judgment is reversed, at the costs of the appellees; cause remanded, with instructions to the court below to sustain the demurrer to the first paragraph of the complaint, and for further proceedings.

S. Stansifer, T. A. Hendricks, O. B. Hord, and *A. W. Hendricks,* for appellant.

R. Hill and *G. W. Richardson,* for appellees.

JOHNSON *v.* CUDDINGTON and Others.

TRESPASS.—*Pleading.*—In an action for trespass *quare clausum fregit*, where the only answer is a general denial, the court has no authority to find a justification of the acts of trespass. That defense requires a special plea.

APPEAL from the Marion Circuit Court.

DOWNEY, C. J.—Action for trespass *quare clausum fregit.* Answer, first, general denial; second and third, justification. Demurrers sustained to the second and third paragraphs. Trial by the court. Special finding by request, in which the court found the acts of trespass, and the amount of the plaintiff's damages, but, going beyond anything in the issue, found that two of the defendants were supervisors of highways, acting under an order to open a highway, and that the other two were acting under their authority. Conclusion of law, that the defendants were not liable for the damages. Exception taken, and also a motion made by the plaintiff for judgment on the findings, overruled, and exception entered.

These rulings were wrong. The court had no authority to find a justification of the acts of trespass under the issue. 2 G. & H. 93, sec. 66; *Wood* v. *Mansell*, 3 Blackf. 125.

The judgment is reversed, with costs, and the cause remanded, with directions to the circuit court to render judgment for the plaintiff for twenty-three dollars and seventy-five cents, the amount in the special finding, and costs.

L. Barbour and *C. P. Jacobs*, for appellants.

THE JEFFERSONVILLE, MADISON, AND INDIANAPOLIS RAILROAD COMPANY *v.* CRANDALL.

APPEAL from the Clark Common Pleas.

PETTIT, J.—This suit was brought to recover damages for

killing stock. Demurrer to the complaint for want of sufficient facts, &c., overruled, and exception. Answer of general denial; trial by the court; finding and judgment for the appellee; motion for a new trial overruled, and exception; and appeal to this court.

The overruling the demurrer to the complaint and the motion for a new trial are assigned for errors. The appellant has not condescended to furnish us with a brief, or any other suggestion why the complaint is bad, or the evidence insufficient; but we do not wonder at this, in view of the great and exhaustive labor it would require to establish the affirmative of either of the propositions. The complaint is so palpably good, and the finding and judgment of the court are so clearly right from the evidence, all of which is in the record, that we feel warranted in saying that this case was brought here for delay merely, and not to correct any error or wrong of the court below. This practice may be justifiable in view of the fact that this court is behind a bank of seven hundred cases, and by it a long stay may be had; but in such cases we shall not hesitate to add the highest amount of damages allowed by law.

The judgment is affirmed, with ten per cent. damages and costs.

G. V. Howk and *R. M. Weir*, for appellant.

J. H. Stotsenburg and *T. M. Brown*, for appellee.

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TEFFT *v.* TEFFT.

DIVORCE.—*Appeal.*—The discretion vested in the circuit and common pleas courts by the seventh subdivision of the seventh section of the act concerning divorces is subject, upon appeal, to revision by the Supreme Court.

SAME.—*Cause.*—Where a man marries a woman whom he knows to be the wife

of another, the courts will not relieve him from the consequences of his act, by granting him a divorce.

MARRIAGE.—*Void.*—If either party to a marriage have a husband or wife living at the time of the marriage, the marriage is absolutely void.

SAME.—*Pleading.*—A pleading, if it states a cause of action, may be good as a complaint to annul a marriage, although it be filed as a petition for divorce, and as such be bad.

SAME.—*Marriage Declared Void.*—A party who innocently contracts a marriage with a woman who is the wife of another, believing her to be unmarried, may, by judicial decree, have the marriage declared void.

JURISDICTION.—*Power to Declare Marriage Void.*—Independent of the provisions of the divorce law, the circuit courts of this State have jurisdiction to declare a marriage void.

APPEAL from the Elkhart Circuit Court.

DOWNEY, C. J.—This was a petition for a divorce. It consisted of two paragraphs. The first sets forth that the parties were married on the 14th day of October, 1839, and, as a cause for divorce, alleges that the defendant was, at the time of her marriage to the petitioner, the wife of another person named in the petition, to whom she had previously been married, and who was then living.

The second paragraph alleges that the parties were married as aforesaid, and states as a cause of divorce, that the defendant, falsely and fraudulently represented to the petitioner that she was sole and unmarried, and had no husband living, and was capable of entering into the contract of marriage; that, in truth and in fact, she was then the wife of said other person, who was then still living, and which marriage was then still subsisting; that he, believing these representations to be true, but in ignorance of the truth with reference thereto, consummated said marriage with her, and lived with her as his wife until within two years last past, when he learned the facts aforesaid, and the falsity of said representations of said defendant, and ceased to cohabit with her, or in any manner to live with her as his wife; that when she made said representations, she knew them to be false, and made them to deceive the plaintiff and induce him to consummate said marriage, without which it would not have been consummated. That he has lived with her as his wife for many years in said

county and state, and which has resulted in relations both domestic and social incompatible with a separation without some judicial declaration thereof. Wherefore, he asks that said marriage may be declared null and void, that he may be entirely released therefrom, and a divorce be decreed in his favor from said defendant, and for other proper relief. The petition was filed March 4th, 1870.

The defendant demurred to the petition, for the reason that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and rendered judgment for the defendant, dismissing the petition; to which the petitioner excepted.

The assignment of errors raises the question as to the correctness of this action of the court. Does the petition set out any cause for which a divorce can be granted? The appellant's counsel refer us to *Janes* v. *Janes*, 5 Blackf. 141. But counsel for both parties seem to have overlooked the fact that that case was based on the Revised Statutes of 1831, referred to in the opinion, and which expressly provided for this as a cause for which a divorce might be granted. Revised Statutes of 1831, 213, sec. 1.

There is no such provision in the present statute. But the counsel for the appellant claim that the petition sets forth a good ground for a divorce under the *seventh* division of section 7, 2 G. & H. 351, which authorizes the court to grant a divorce for "any other cause" than those enumerated, "for which the court shall deem it proper that a divorce should be granted."

It was said by this court, in *Ruby* v. *Ruby*, 29 Ind. 174, that "cases may frequently arise, presenting causes for divorce not enumerated in the statutes, in which justice and public policy would alike justify the courts in granting them, under the discretion conferred by the statute."

In *Ritter* v. *Ritter*, 5 Blackf. 81, the clause similar to this one in the statute of 1831, was held to be constitutional; that the discretion vested in the inferior courts by that statute was subject to the revision of this court; and in that

case, where the circuit court had refused to grant the divorce, under this provision of the statute, the judgment was reversed, and the cause remanded, because this court was of the opinion that the divorce should have been granted.

The first paragraph of the petition alleges only that the defendant was a married woman—the wife of another man—at the time she was married to the petitioner. It does not even appear that that fact was unknown to him, that he did not enter into the marriage contract with her with full knowledge that she was the wife of another man. For this reason, if for no other, that paragraph cannot be sustained. The court cannot undertake to extricate parties from relations into which they place themselves with a full knowledge of all the facts, and with no one to blame but themselves.

With reference to the second paragraph, while there is no specific provision of the statute authorizing the granting of a divorce for this cause, and while it may be no cause for a divorce at all, we are not prepared to say that a party, in such a case, is destitute of all remedy. It is true that the statute declares marriages void, where either party had a wife or husband living at the time of such marriage (1 G. & H. 429, sec. 2); but the consequences to the innocent party resulting from the uncertainty attending the fact, or for other reasons, might make it of the utmost importance to such party to have a judicial investigation and decree.

Though in this case the pleading setting forth the cause of action is denominated a petition, and was probably filed with reference to the divorce law, yet if it states the facts necessary, it may, perhaps, be held good as a complaint to annul the marriage, on account of the alleged fraud.

Chancellor KENT says, "A marriage procured by force or fraud is void, *ab initio*, and may be treated as null by every court in which its validity may be incidentally drawn in question. The basis of the marriage contract is consent, and the ingredient of fraud or duress is as fatal in this as in any other contract, for the free assent of the mind to the contract is wanting." Again, he says, "It is equally proper in this

case, as in those of idiocy or lunacy, that the fraud or violence should be judicially investigated, in a suit instituted for the very purpose of annulling the marriage; and such a jurisdiction in the case properly belongs to the ecclesiastical courts in England, and to the courts of equity in this country." And again, he says, "It is well understood that error, and even disingenuous representations, in respect to the qualities of one of the contracting parties, as his condition, rank, fortune, manners, and character, would be insufficient. The law makes no provision for the relief of a blind credulity, however it may have been produced." 2 Kent Com. 76, 77. And see Cooley's Blackstone's Com., book 1, p. 439, note 15.

But in a case where, as in this case, the contract is void *ab initio*, will the court take jurisdiction for the purpose of a judicial declaration of that fact?

The statute of frauds declares conveyances made to hinder, delay, or defraud creditors void, and they might always be so adjudged where they came in question in a court of law. But notwitstanding this, courts of chancery entertained jurisdiction to declare them void and clear them out of the way of the judgment creditor. *Brown* v. *Wyncoop*, 2 Blackf. 230; *Frakes* v. *Brown*, *id.* 295; *Rogers* v. *Evans*, 3 Ind. 574; *Scott* v. *Purcell*, 7 Blackf. 66.

It was held by this court in *Hays* v. *Hays*, 2 Ind. 28, that courts of equity will entertain jurisdiction to cancel or set aside an instrument void on its face.

The constitution of this State provides that the judicial power of the State shall be vested in a Supreme Court, in circuit courts, and in such inferior courts as the general assembly may establish. Art. 7, sec. 1.

It also provides that the circuit courts shall have such civil and criminal jurisdiction as may be prescribed by law. Art. 7, sec. 8.

It is provided by statute that the circuit court shall have original exclusive jurisdiction in all cases of slander, libel, breach of marriage contract, and when the title to real estate

shall be in issue, and concurrent jurisdiction, except as otherwise provided by law, *in all civil actions*, &c. 3 Ind. Stat. 181, sec. 5.

In *Wightman* v. *Wightman*, 4 Johns. Ch. 343, Chancellor KENT said, "In England all matrimonial, and other causes of ecclesiastical cognizance, belonged originally to the temporal courts, and when the spiritual courts cease, the cognizance of such causes would seem, as of course, to revert back to the lay tribunals. I apprehend, then, that the power is necessarily cast upon this court, which has, by statute, the sole jurisdiction over the marriage contract in certain specified cases. The legislature has, in that respect, pointed to this court as the proper organ of such jurisdiction."

In *LeBarron* v. *LeBarron*, 2 Amer. Law Reg. (N. S.) 212, a case in the Supreme Court of Vermont, it is said, "The legal power to annul marriages has been recognized as existing in England from a very early period, but its administration, instead of being committed to the common law courts, was exercised by their spiritual or ecclesiastical courts. Under the administration of those courts, for a long period of time, the principles and practice governing this head of their jurisdiction ripened into a settled course and body of jurisprudence, like that of the courts of chancery and admiralty, and constituted, with those systems, a part of the general law of the realm, and in the broad and enlarged use of the term, a part of the common law of the land, and was so held by the courts of that country. This country having been settled by colonists from that, under the general authority of its government, and remaining for many years a part of its domain, became and remained subject and entitled to the general laws of the government, and they became equally the laws of this county, except so far as they were inapplicable to the new relations and condition of things. This we understand to be well settled, both by judicial decision and the authority of eminent law writers. But if this were not so, the adoption of the common law of England, by the

legislature of the state, was an adoption of the whole body of the law of that country (aside from their parliamentary legislation), and included those principles of law administered by the courts of chancery and admiralty and the ecclesiastical courts (so far as the same were applicable to our local situation and circumstances and not repugnant to our constitution and laws), as well as that portion of their laws administered by the ordinary and common tribunals."

In *Perry* v. *Perry*, 2 Paige, 501, Chancellor WALWORTH held, that that part of the law of England which renders a marriage contract absolutely void in certain cases formed a part of the law of the state of New York, and might be enforced by the appropriate tribunals, independent of any statutory provision. This case seems well sustained by authorities, among which is that of *Wightman* v. *Wightman*, *supra*, by KENT, Chancellor. *Scott* v. *Shufeldt*, 5 Paige, 43, is another case to the same effect.

Having adopted the common law of England in this State by legislative enactment, 1 G. & H. 415, and the rules which were applied in cases of this kind in the ecclesiastical courts of that country being a part of the common law, 1 Bl. Com. 67, it would seem to follow that those rules are a part of the law of this State. The circuit court in this State having, as we have already seen, jurisdiction in all civil actions, except when otherwise provided, it follows that they have jurisdiction to declare the marriage contract void in a direct proceeding in a proper case, independent of any provisions in the divorce law.

We are not very favorably impressed with the merits of the case made in the second paragraph of the complaint in the case at bar, on account of the lapse of time, but we have concluded to hold that paragraph good. We cannot tell what facts may be disclosed in the further progress of the case.

The judgment is reversed, with costs, and the cause remanded.

A. S. Blake and *R. M. Johnson*, for appellant.

J. H. Baker and *J. A. S. Mitchell*, for appellee.

TRUSTEES OF THE TOWN OF PRINCETON *v.* MANCK.

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150 571

35 51
158 460

TOWN—*Annexation of Contiguous Territory.—Appeal from Board of Commissioners.*—In a proceeding by an incorporated town to annex contiguous territory no appeal lies from the judgment of the board of county commissioners.

STATUTE CONSTRUED.—*Appeals from Commissioners' Court.*—The general provision of the statute relative to appeals from the commissioners' court applies only to ordinary civil proceedings.

APPEAL from the Gibson Circuit Court.

PETTIT, J.—This was a proceeding commenced before the board of commissioners of Gibson county for the annexation of contiguous territory, belonging to the appellee, to said town. The board made the order as petitioned for, annexing the territory. Appeal to the circuit court, and there appellee moved the court to dismiss the case for want of the proper notice before the commissioners; which motion was sustained; exception, and appeal to this court. The act under which this proceeding was instituted was approved June 11th, 1852, and is entitled, "An act for the incorporation of towns, defining their powers, providing for the election of the officers thereof, and declaring their duties." The only portions of the act relating to the question before us, are secs. 51 and 52, 1 G. & H. 630, and are here quoted.

"SEC. LI. When any town shall desire to annex contiguous territory thereto, not platted or recorded, the trustees shall present to the board of county commissioners a petition setting forth the reasons for such annexation, and shall accompany the same with a map or plat accurately describing by metes and bounds the territory proposed to be attached, which shall be verified by affidavit. Such trustees shall give thirty days' notice by publication in a newspaper printed in such town, if any, otherwise in the county, or if none, then by posting up such notice in five or more public places within the corporation; a copy of such notice shall be served on the owner or owners of such territory, if known, and are residents of the county.

"SEC. LII. The board of county commissioners upon the reception of such petition shall consider the same, and shall hear the testimony offered for or against such annexation; and if, after inspection of the map, and the testimony being heard, such board is of the opinion that the prayer of such petition should be granted, it shall cause an entry to be made on the order book, specifying the territory annexed, with the boundaries thereof, according to the survey, which entry or an attested copy thereof shall be conclusive evidence in all courts, of such annexation."

These sections do not provide for, or contemplate, an appeal from the action of the board, but, on the contrary, it is provided that the affirmative action of the board "shall be conclusive evidence in all courts of such annexation." The act for the incorporation of cities, 3 Ind. Stat. 63, sec. 86, has the same provision as to the conclusiveness of the action of the board in the annexation of contiguous territory, and though we are not aware of the question of the right of appeal from the board ever having been presented to this court, yet some of us know, as a matter of fact, that such appeals have been dismissed by the circuit courts for want of jurisdiction. The general provision for appeals from the board of commissioners does not apply to all matters upon which they are required to act. An examination of the statutes will show a number of instances where an appeal is not allowed, as in the case of allowances for services voluntarily rendered, 1 G. & H. 65, sec. 9. In *Allen* v. *Hostetter*, 16 Ind. 15, it is held by this court, "that the general statute upon the subject of appeals was enacted in view of ordinary civil proceedings, and does not embrace proceedings under special acts; and hence no appeal will lie from the decision of the county board on a petition for the formation of a new county." In *French* v. *Lighty*, 9 Ind. 475, it was held, although there was a statute giving an appeal from the circuit and common pleas courts to the Supreme Court from all final judgments, that no appeal would lie from a final judgment of a circuit court in a contested

election case. *In re Smith*, 10 Wend. 449, and other authorities are cited. The board of commissioners have administrative, and, to some extent, judicial powers, and, in our judgment, the general assembly wisely left this question to their final determination, instead of allowing it to go to the higher judicial tribunals.

We hold that the circuit court had no jurisdiction of the appeal.

The judgment is reversed, at the costs of the appellee, with instructions to the circuit court to dismiss the appeal for want of jurisdiction.

D. F. Embree, for appellants.

O. M. Welborn, for appellee.

FERGER *v.* WESLER.

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144 289
35 53
159 590

PRACTICE.—*New Trial as of Right.*—The filing of a motion and payment of costs within a year after a judgment for the recovery of real estate does not entitle a party to a new trial as a matter of right under section 601 of the code.

SAME.—*Power of Court in Vacation.*—The court cannot grant a new trial in vacation.

SAME.—The party who seeks a new trial under section 601, must make his application, pay the costs, and obtain the order of the court granting a new trial, or its refusal to do so, within one year after the rendition of the judgment, or the ruling of the court upon the motion cannot be assigned for error.

APPEAL from the Dearborn Circuit Court.

PETTIT, J.—Appellee recovered against the appellant a judgment for the possession of real estate. Within a year of the rendition of the judgment, the appellant paid the costs and filed in the clerk's office a motion for a new trial, as of course, under section 601 of the code, and gave notice that said motion would be heard before the judge in vacation.

The judge refused to grant the new trial in vacation. This is assigned for error, but it was not error. The section cited says, the *court* shall vacate the judgment and grant a new trial. "When a law authorizes or contemplates the doing of a judicial act, it is and must be understood to mean that the *court*, in term time, may or must do it, and the judge, in vacation, cannot, unless the power is expressly conferred upon him." *Reyburn* v. *Bassett*, McCahon, 86.

Thus matters rested till more than a year after the rendition of the judgment, when the appellant moved the court in term time, on the written application filed in vacation, to vacate the judgment and grant him a new trial, as of right. The appellee objected to the new trial, for the reason that more than one year had elapsed since the final judgment was rendered; and the court sustained the objection, and overruled the motion for a new trial. This ruling is assigned for error. There was no error in this. The party who seeks a new trial under section 601 of the code, must pay the costs, make application to the *court*, get its order granting a new trial, or its refusal to do so, within one year after the judgment is rendered, or he will be too late in such a proceeding as this.

The judgment is affirmed, at the costs of the appellant.*

J. Schwartz, for appellant.

W. H. Bainbridge and *F. Adkinson*, for appellee.

* Petition for a rehearing overruled.

BISSELL *v.* WERT.

EVIDENCE.—*Opinion.*—Where damages are claimed for a breach of contract, by reason of the unskilful sowing of clover, it is not competent to ask a witness the amount of damages sustained by reason of the unskilful sowing. The witness should state the facts, from which the court or jury may determine the damages.

CONVERSION.—*Instruction to Jury.*—Where a party is charged with having converted personal property in his possession to his own use, it is error to instruct the jury that the evidence of conversion must amount to more than a preponderance, for the reason that the charge involves the moral turpitude of the crime of larceny, and that the evidence must satisfy the jury of the truth of the charge beyond a reasonable doubt.

QUESTION OF LAW RESERVED.—When a question of law is reserved under section 347 of the code, and the evidence is not in the record, this court cannot say that the verdict is sustained by the evidence, and that the giving of an erroneous instruction, which in effect excluded from the jury the principal ground of defense, resulted in no injury.

APPEAL from the Elkhart Circuit Court.

BUSKIRK, J.—The first question raised in the record of this case is upon the action of the court below in excluding the testimony of the witness John Van Frank.

The action was by the appellee against the appellant upon account for work and labor done. The second paragraph of the answer is a plea of set-off, wherein it is shown that the plaintiff was and had been a tenant upon the farm of the appellant, under a written agreement or lease, wherein and whereby it was, among other things, provided that the plaintiff should sow and harrow in clover upon certain fields where wheat was then growing. As a breach of this contract, the answer alleged that the plaintiff sowed said clover in an unskilful manner, by scattering the seed too thinly, and not harrowing the same in at all, whereby the defendant's share of the product of seed and clover was greatly reduced, and the benefit to the land from the sowing of the clover was greatly less.

The contract was read in evidence. Evidence was introduced tending to prove a breach of the contract. The appellant then offered to prove by Van Frank, a competent witness, skilled and experienced in such matters, that damage results to the land from such unskilful sowing of clover and not harrowing the same in, and the amount of such damages in this case; said witness having made a personal examination of the stand of clover on the said fields in September, 1869; to which evidence the appellee objected, and the objection was sustained, and the evidence was excluded; to which ruling

an exception was taken. This ruling is assigned for error.

The effect of the question asked and overruled was, that the witness should give his opinion as to the amount of damages sustained by the appellant by reason of the unskilful sowing of the clover seed, and the failure to harrow in the same. It is well settled, both by authority and on principle, that the evidence offered was clearly inadmissible. The general rule is, that witnesses must speak to facts, and that mere opinions are not admissible. The reason of the rule is stated by Best in these words: "If those opinions are founded, either on no evidence, or on illegal evidence, they are not to be listened to; if founded on legal evidence, that evidence ought to be laid before the jury, whom the law presumes to be at least as well capable as the witnesses of drawing from them any inferences which justice may require." Best, Prin. Ev. 384, sec. 344.

The only exceptions to this rule are where professional and scientific witnesses may give their opinions upon questions of skill and science, and where a question of sanity or insanity is involved; in which case persons who are not professional or scientific witnesses may state the facts and give their opinions based on the facts testified to by such witnesses. Upon the like ground, it is the every day's practice to take the opinion of witnesses as to the value of property. These cases all stand upon the general ground of peculiar skill and judgment in the matters about which opinions are sought. It is said, in *Lincoln* v. *Saratoga R. R. Co.*, 23 Wend. 425, that "opinions, belief, deductions from facts, and such like, are matters which belong to the jury; when the examination extends to these, and the judgment, belief and impressions of witnesses are inquired into as matters proper for the consideration of a jury, their province is in a measure usurped; the judgment of the witness is substituted for that of the jury."

It has been repeatedly decided by this court, that in an action for damages, the opinions of witnesses as to the amount

of such damages are inadmissible. *E., I., & C. Straight Line R. R. Co.* v. *Fitzpatrick*, 10 Ind. 120; *Sinclair* v. *Roush*, 14 Ind. 450; *The T. & W. R. W. Co.* v. *Smith*, 25 Ind. 288; *Mitchell* v. *Allison*, 29 Ind. 43.

In *Whitmore* v. *Bowman*, 4 Greene, Iowa, 148, the law is stated as follows: "As a general rule, witnesses should state facts, and not opinions. They should give in evidence what they have seen and know in relation to the issue pending, and from these facts the jury will form an opinion. To this rule, however, there are many exceptions. These exceptions are applicable mostly to questions of science, skill, or trade, and to persons who are experts in relation to those questions. But in no case should a witness be permitted to express an opinion as evidence, where the jury, to whom the facts are submitted, are supposed to be equally well qualified to form an opinion. Unless this practice should prevail, it must follow that witnesses, subject often to strong feelings of prejudice or partiality, may dictate a verdict to the jury."

This court, in *Mitchell* v. *Allison*, 29 Ind. 43, says, "On the trial, while the defendant was testifying as a witness, he was asked this question: 'State what the damage was to you by reason of Allison not cutting and putting up the hay in proper order, and also what you was damaged by reason of Allison not gathering and securing the corn properly.' The court below, on the objection of the plaintiff, refused to allow the question to be answered. We think in this the court was right. It was for the jury to determine the amount of the damages from the facts, uninfluenced by the opinion of witnesses. The damages resulting from the non-performance of a contract to cut and put up hay, and to gather corn, was a matter about which the jury were as well qualified to form an opinion after hearing the facts as the witness."

We refer to the following authorities by us examined, as having a bearing on the question under consideration:

The Jefferson Ins. Co. v. *Cotheal*, 7 Wend. 72; *Norman* v. *Wells*, 17 Wend. 136; *The People* v. *Rector*, 19 Wend. 569; *Fish* v. *Dodge*, 4 Denio, 311; *Lamoure* v. *Caryl*, 4 Denio, 370;

Paige v. *Hazard*, 5 Hill, 603; *Giles* v. *O'Toole*, 4 Barb. 261; *Smith* v. *Gugerty*, 4 Barb., 614; *Morehouse* v. *Mathews*, 2 Comst. 514; *Sears* v. *Shafer*, 1 Barb. 408; *Dewitt* v. *Barley*, 5 Seld. 371; *Joy* v. *Hopkins*, 5 Denio, 84; *Brill* v. *Flagler*, 23 Wend. 354; *M'Kee* v. *Nelson*, 4 Cow. 355; *Dunham* v. *Simmons*, 3 Hill, 609; *Town of Rochester* v. *Town of Chester*, 3 N. H. 349; *Town of Peterborough* v. *Town of Jaffrey*, 6 N. H. 462; *Whipple* v. *Walpole*, 10 N. H. 130; *Beard* v. *Kirk*, 11 N. H. 397; *Tebbetts* v. *Haskins*, 16 Me. 283; *Kellogg* v. *Krauser*, 14 S. & R. 137; *Vandine* v. *Burpee*, 13 Met. 288; *Steamboat Albatross* v. *Wayne*, 16 Ohio, 513; and *Clark* v. *Baird*, 5 Seld. 183, where the authorities are fully reviewed and the question is ably discussed.

The second question raised in the record is upon the action of the court below in giving and refusing to give certain instructions. It is charged in the second paragraph of the answer that the plaintiff had converted to his own use eight tons of hay and certain wheat, which belonged to the defendant, of the value of one hundred and twenty-one dollars, and a set-off was claimed therefor.

We are informed by the bill of exceptions, "that there having been evidence given to the jury tending to prove that the plaintiff, being in possession of hay of the defendant, had converted the same to his own use, without the consent or knowledge of the defendant, and also tending to prove the value of the hay so converted, and the defendant having at the proper time asked the court to give the following special instruction, namely: number one, 'If the preponderance of the evidence in this case shows that the plaintiff took hay or wheat belonging to the defendant and used the same for his own benefit, you should allow the defendant a set-off for the value thereof,' the court refused to give the same, but on that point instructed the jury as follows: 'If you find from the evidence that Wert, the tenant, converted to his own use, and failed to deliver to Bissell any wheat or hay or other part of the crops mentioned in defendant's bill of set-off, that justly belonged to him, the defendant, he, the defendant, is

entitled to recover the value of any such property so converted by the plaintiff. But in order to warrant you in finding such a conversion clandestinely made, with the intent on the part of the plaintiff that it should be without the knowledge of the defendant and thereby to deprive the defendant of the value thereof, the evidence must amount to more than a preponderance, for the reason that such a conversion, although not technically a larceny, because of the possession being in the plaintiff, yet it would involve the moral turpitude of the crime of larceny, and in order to find this crime in a civil case, the same rule applies as is applied to the state in a criminal prosecution; that is, the evidence must satisfy you of the truth of the charge beyond a reasonable doubt; that is, it must produce in your minds that conviction of the truth of the fact as you would as reasonable and prudent men be willing to rest upon in the transaction of your own important affairs;' to the giving of which the defendant at the time excepted, and asked the court to charge the jury, that under the pleadings and issues made in this case, there is involved no charge of moral or criminal turpitude, such as to require more than a fair preponderance of the evidence; which the court refused to do, saying to the jury that if the evidence raised an implication of such moral or criminal turpitude in the taking or conversion of wheat or hay, then the taking or conversion must be proved beyond a reasonable doubt, in order to entitle defendant to relief."

Proper exceptions were taken by the appellant to the instructions given and those refused.

It is earnestly maintained by the appellee that the instructions given are correct, and that those refused were incorrect, and in support of these positions the following authorities are referred to: *Byrket* v. *Monohon*, 7 Blackf. 83; *Lanter* v. *M'Ewen*, 8 Blackf. 495; *Woodbeck* v. *Keller*, 6 Cow. 118; *Clark* v. *Dibble*, 16 Wend. 601; *Wonderly* v. *Nokes*, 8 Blackf. 589; *Gants* v. *Vinard*, 1 Ind. 476; *Swails* v. *Butcher*, 2 Ind. 84; *Strader* v. *Mullane*, 17 Ohio St. 624; and 1 Greenl. Ev. sec. 65.

All the cases above referred to, except *Wonderly* v. *Nokes*, 8 Blackf. 589, and *Strader* v. *Mullane*, 17 Ohio St. 624, were actions for slander, for words charging the plaintiff with having been guilty of perjury, and in each of the cases the defendant justified on the ground that the plaintiff had committed willful and corrupt perjury. In *Wonderly* v. *Nokes, supra*, the action was for slander, for words charging the plaintiff with having been guilty of larceny, to which the defendant pleaded in justification, charging that the plaintiff had been guilty of the crime of larceny.

The section referred to in Greenleaf's Evidence has no application to this question, as that discusses the degree of certainty required in criminal and civil cases.

It is true, as a general rule, that a proponderance of evidence in civil cases is sufficient, but the proof in all cases must conform to the specific allegations upon the record. There seems to be little, if any, difference between the evidence required in proof of a specific charge alleged in the course of a civil proceeding and the evidence which would be essential to support an indictment for the same charge. Therefore, in an action of slander for charging the plaintiff with having been guilty of a crime, the defendant, to sustain a plea of justification, must give as conclusive proof as would be necessary to convict the plaintiff of the crime charged on an indictment. But to bring a case within this rule, it is necessary that there should be a specific charge of a crime. A crime that it is charged by implication will not bring the case within the exceptions to the general rule. Nor will it be sufficient that the facts charged involve the party in the moral turpitude of a crime.

The case of *Strader* v. *Mullane*, 17 Ohio St. 624, fully supports the above proposition. The court say, "The action was upon an account for 'middlings' (horse feed) sold and delivered. It was set up as ground of defense, and also in support of a counter claim to recoup for payments previously made for middlings, that the plaintiffs below had fraudulently given short weight, or fraudulently

charged for more middlings than had been delivered. The case was tried by a jury, and, upon the trial, evidence was given tending to show the alleged fraud, as to the middlings for the price of which the suit was brought. After the evidence had closed, the counsel of defendants (plaintiffs in error) asked the court to charge the jury, that if they found there had been a fraudulent and false weighing, or overcharging of the middlings, the price of which was sued for, they might then look to the alleged frauds as to the middlings previously paid for, and allow a reclamation to the extent of the fraud. This request the court refused, but gave substantially the instruction asked, with the qualification that fraud must be proven beyond all reasonable doubt, either by positive testimony, or by circumstances so strong as to exclude other conclusions. The only question argued in the case is, whether the court erred in this refusal and instruction; in other words, whether a charge of fraud, in a civil action, like a charge or crime, must be proved by evidence excluding all reasonable doubt. We answer the general question in the negative. Where the fraud charged is a criminal offense, we have no doubt the rule laid down by the court should apply. It seems to be established law that in civil as well as in criminal cases, a party cannot be found guilty of a crime, unless upon proof which excludes all reasonable doubt. This is the holding of the court in *Lexington Ins. Co.* v. *Paver*, 16 Ohio, 324. The court in that case sustained a similar charge made by the court below, upon the express ground that the fraud charged, and attempted to be proven, was a criminal act. Such is not the case here. I know the counsel argue that the charge to which the instruction applied in this case was that of obtaining money by false pretenses. But it was not so. The instruction of the court was general, applying as well to the alleged fraud in weighing or overcharging the middlings sued for, as those paid for before. Besides, the fraudulent obtaining of the money, which is the gist of the offense referred to, was not directly charged or put in issue,

but was merely inferential. It is not in every case where the necessary inference of crime follows the finding of an issue against a party, that it can be said the commission of the crime was put in issue. The perjury of a party might be said to be in issue in all cases where he is a witness in the cause. If you plead *non est factum* to an action brought upon your bond, you do not thereby charge the plaintiff with forgery,nor if you plead payment of it, do you thereby charge him with fraudulently trying to extort the money from you a second time."

Applying the principles of law so well stated in the above case to the one under consideration, it necessarily results, that the instructions given were incorrect, and that the court should have given the instructions asked by the appellant. In this case there was no direct and specific charge of any crime. In fact, there could have been no inference or presumption of crime. The court charged the jury that there had been no larceny committed, for the reason that the property alleged to have been converted was, at the time of such conversion, in the lawful possession of the plaintiff below. A conversion of property under such circumstances could amount to no more than a breach of trust. The court erred in the giving of the instructions complained of, and in refusing the instructions asked. The appellant was entitled to a new trial. It has been very strongly urged upon us by the appellee, that, conceding that the court had erred in the giving of instuctions, the case should not be reversed, for the reason that the verdict of the jury was fully sustained by the evidence. This case is brought here on reserved questions under section 347 of our code, 2 G. & H. 210. The evidence is not in the record, and we are not authorized to say that the giving of an erroneous instruction, which excluded from the consideration of the jury, in effect, the principal ground of defense, resulted in no injury to the appellant. The appellee has also pressed upon our consideration several technical objections to the manner in which the questions are presented in the record, but in view

of the importance of the questions involved, we have preferred to decide the case upon the merits.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

W. A. Woods, for appellant.

J. H. Baker and *J. A. S. Mitchell*, for appellee.

DRITT *v.* DODDS.

BILL OF EXCEPTIONS.—Where a motion to dismiss a cause appealed to the circuit court from the board of county commissioners is sustained, the Supreme Court will presume in favor of the correctness of such action of the court below if no bill of exceptions be filed. 35 63 / 136 567

APPEAL from the Cass Circuit Court.

DOWNEY, C. J.—This was a proceeding by the appellant against the appellee to contest his election to the office of auditor of the county. Before the commissioners there was a judgment in favor of the contestant. The contestee appealed to the circuit court, where, as the clerk's entry says, the defendant moved the court to dismiss the cause, which motion was sustained; to which ruling of the court the plaintiff excepted. Time was given in which to file a bill of exceptions, but none was ever filed. There is, therefore, no question before us, as we must presume in favor of the correctness of the action of the circuit court. There are many cases in this court, which might be cited, to this effect. *Smith* v. *Smith*, 15 Ind. 315; *Conoway* v. *Weaver*, 1 Ind. 263, and cases there cited.

The judgment is affirmed, with costs.

N. O. Ross, *R. P. Effinger*, and *R. Magee*, for appellant.

S. T. McConnell and *M. Winfield*, for appellee.

LEFFRET v. JACKSON.

APPEAL from the Cass Circuit Court.

PETTIT, J.—This was a proceeding to contest an election, commenced before the board of commissioners. On an appeal to the circuit court, the cause was dismissed on the motion of the defendant. Exception, and time given to file a bill of exceptions, but none was filed. There is, therefore, no question before us for our consideration. On the authority of *Dritt* v. *Dodds*, decided at this term, *ante*, p. 63, the judgment of the circuit court is affirmed, at the costs of the appellant.

D. H. Chase and —, *Nelson*, for appellant.

S. T. McConnell and *M. Winfield*, for appellee.

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MILLIGAN v. POOLE and Others.

PARTITION.—*Jurisdiction.*—In a proceeding for partition, the court has ample power to settle the rights of the parties interested in the land; and if it has to be sold, their rights are the same in the proceeds that they were in the land; and the court has power to adjust and secure their rights, whether legal or equitable, in the proceeds of such sale.

SAME.—*Parties.*—All persons interested in the land should be made parties.

SAME.—*Liens.*—Persons holding a lien on any undivided interest, by mortgage, judgment, or otherwise, if made parties to the suit, will be bound by the partition, and limited in their claims to the share set off to the party under whom they claim.

SAME.—A. and B. owned certain real estate as tenants in common. B. sold his undivided interest to C., and gave him a bond for a deed when paid for, and put him in possession; a part of the purchase-money was paid by C. and his notes given for the balance. A. then instituted proceedings for partition, making B. and C. parties defendants, and under the proceedings the land was sold by order of court.

Held, that the contract of sale between B. and C. must be held to have been made with reference to the legal incidents pertaining to the land; that C., when he contracted with B. for the purchase of an undivided interest in the

land, knew that A. had the right at any time to compel partition, or in the event that a division could not be made, to have the land sold; and hence the sale of the land in the suit for partition was not a breach of the bond to convey, made by B. to C.; that after the sale B. was no longer bound to convey, and C. was no longer in a condition to demand a conveyance.

Held, also, that B. held the legal title only as security for the payment of the purchase-money, and he was entitled to have the residue of the purchase-money coming to him from C. paid out of the proceeds of the sale, if there was sufficient of it; if not sufficient, he had a right to retain the notes of C. as evidence of his right to collect the residue when it should become due.

APPEAL from the Parke Common Pleas.

DOWNEY, C. J.—Buchanan and Milligan owned certain real estate in equal shares, as tenants in common. Milligan sold his undivided half to Poole and Magill, gave them a bond for a deed on payment of the purchase-money, and put them in possession. They paid the first two instalments of the purchase-money. Buchanan then instituted a proceeding by petition for partition of the real estate, making Poole and Magill, as well as Milligan, defendants. Milligan filed an answer and cross bill, setting up the facts with reference to the sale of his one-half of the property to Poole and Magill, showing the amount due him on the purchase, and when payable, giving a copy of the bond executed by him to them, asking that his interests be protected by the judgment of the court, and offering to convey to the purchaser under the judgment, if the court should so order, stating also that the property could not be divided, but would have to be sold. Poole and Magill made default.

The court adjudged partition, and appointed commissioners, who subsequently reported that partition of the real estate could not be made without damage to all the owners. Thereupon the court ordered the sale of the property through the agency of a commissioner appointed for that purpose. The court also ordered that the commissioner, after paying the costs and expenses, should pay to Buchanan one-half of the proceeds, and that he pay the other one-half into court for the other parties whose rights therein were not yet set-

tled. The commissioner reported at the next term that he had sold the real estate to Buchanan, whereupon the sale was approved. Poole and Magill then appeared, and on their motion the answer and cross petition of Milligan, filed at the previous term, were stricken out. Milligan excepted by bill of exceptions setting out the rejected pleading. Poole and Magill then filed a petition setting up the particulars of the contract of purchase by them from Milligan of the one-half of the real estate; that they had paid eight hundred dollars of the price; that there remained to be paid, when due, seventeen hundred dollars, and interest on the same; that they went into possession, and had performed all their part of the contract, but Milligan had permitted the land to be sold, and had failed to protect them in the possession of said real estate, from which they had been evicted by the sale made by the order of the court as above stated; and that he had thus made it impossible for him to perform the contract which he had made with them. They offered to surrender the land, and asked a return of the amount which they had paid, and the surrender of their notes yet to become due.

They prayed an order of the court rescinding the contract of purchase, for the payment of four hundred dollars to each of them, with interest, to be paid out of the proceeds of the one-half of the property so sold, before any part thereof should go to Milligan; that Milligan surrender up their notes; that they be released from the payment of any part of the costs; and for other proper relief. They made a copy of the bond from Milligan to them part of their petition.

Milligan demurred to the petition, on the ground that it did not state facts sufficient to constitute a cause of action, or to entitle Poole and Magill to the relief prayed for. This demurrer was overruled, and Milligan excepted.

The case was then submitted to the court for trial, with a request from both parties to make a special finding. Then follows in the record what purports to be a special finding by the court, but which we cannot so regard, for it is not signed by the judge, nor incorporated in a bill of exceptions. See

Peoria, &c., Co. v. *Walser*, 22 Ind. 73; *Roberts* v. *Smith*, 34 Ind. 550.

In rendering judgment, the court took the contract price of the one-half of the property sold by Milligan to Poole and Magill, which was twenty-five hundred dollars, as a basis, and divided the purchase-money, after payment of the costs and expenses, by giving to Milligan seventeen twenty-fifths, and to Poole and Magill eight twenty-fifths thereof. The court also ordered that Milligan surrender up the notes of Poole and Magill, and that they surrender up to Milligan the bond.

Neither party was satisfied with the result; each attempted, by exception to the decision of the court, to reserve the questions of law; each moved for a new trial; each appealed to this court; and each has here assigned errors.

The evidence is not put in the record by bill of exceptions, so that we cannot review the questions of fact; and the special findings, as we have said, do not properly present any question of law.

The only questions before us, then, are those relating to the striking out of the answer and cross complaint of Milligan, and the overruling of the demurrer by him to the petition of Poole and Magill.

It will be seen at once, that the two theories of the case, entertained by the opposite parties, are widely different. Milligan contends that he was entitled to the payment of the whole amount of his purchase-money, and that he had a right to keep his hands upon the money arising from the sale of the property until he was paid; while Poole and Magill insist that the sale of the property in the partition suit, its purchase by Buchanan, and his taking possession thereof, and turning them out, put an end to the contract of purchase by them and entitled them to have the contract rescinded, to have a repayment of the amount which they had paid of the purchase-money, and interest thereon, and the surrender of their notes not yet due. They submit that, as the property has been sold, Milligan cannot possibly convey to

them, as he undertook to do by his bond, and that therefore they have the right to rescind.

The court, not adopting the views of either party, divided the money between them in proportion to the amount of the paid and the unpaid parts of the purchase-money.

Anciently joint tenants and tenants in common could not be compelled to make partition; but coparceners could be so compelled, and this is why they were so denominated; Cooley's Bl. Com. b. 2, p. 189. But partition has been provided for by statute, in England, between joint tenants and also tenants in common, since 31 Henry VIII. *Id.* p. 185, 194.

In this State, it is provided by statute that all persons holding lands as joint tenants, or tenants in common, or tenants in coparcenary, may be compelled to divide the same as provided for in the act. 2 G. & H. 361. Ample provision is made for ascertaining and settling the rights of the parties interested in the land, and if the land cannot be divided without damage to the owners, and consequently has to be sold, the court has power to adjust and secure the rights of the parties in the proceeds of such sale. And whether those rights be legal or equitable they are equally within the cognizance and protecting power of the court. *Martindale* v. *Alexander*, 26 Ind. 104; *Cradlebaugh* v. *Pritchett*, 8 Ohio St. 646.

To give validity and effect to a partition, all persons interested should be made parties to the suit. If they are not, their interests will not be affected by the proceeding, but will remain as before. Parties holding a lien on any of the undivided interests by mortgage, judgment, or otherwise, if made parties to the suit, will be bound by the partition, and limited in their claims to the share set off in severalty to the party under whom they claim. Washburn Real Prop. 585.

What, then, were the rights of the parties in this case? In the first place, we do not think that the sale of the land in the suit for partition was any breach of the terms of the bond. When the purchasers, Poole and Magill, entered into

the contract with Milligan for the purchase of an undivided half of the property, it must be held that they knew that Buchanan had the right, at any time, to compel partition of the lands, or in the event that a division could not be made, to have the property sold. Such partition or sale could no more be a breach of the terms of the bond, than it would have been a breach of the covenants in the deed if the legal, instead of an equitable, title had been conveyed. Such contracts must be regarded and treated as made with reference to the legal incidents which pertain to the subject of them.

It is contended that the sale put it out of the power of Milligan to convey. This is true; but while this is true, it is equally true that the sale made it unnecessary for him to convey. A suit for partition is an action *in rem*, and the land having been sold in conformity to a judgment in a suit to which Milligan and also Poole and Magill were parties, their interests in the land were gone. Milligan was no longer bound to convey, and Poole and Magill were no longer in a condition to demand a conveyance. The same act which put it out of the power of Milligan to convey, also deprived Poole and Magill of the right ever to demand a conveyance. It is said that Milligan should have purchased the land at the sale and thus have retained the right to convey, when the time arrived, and protected his vendees in the right to the possession. But may it not with equal propriety be said that Poole and Magill should have purchased, and thus preserved their rights as vendees and kept themselves in position to assert their rights as such?

There was, in this case, a valid contract for the sale of the real estate, the purchasers were put in possession, and had paid part of the purchase-money. The vendor held the legal title only as security for the payment of the residue of the purchase-money. His relation to the property was somewhat like that of a mortgagee. *Amory* v. *Reilly*, 9 Ind. 490.

Had the property in question consisted mainly in buildings, and had they been destroyed by fire, without any fault of the vendees, it would have furnished them no excuse for

the non-payment of the purchase-money, and the loss would have fallen on them. *Thompson* v. *Norton*, 14 Ind. 187.

We think that where land in which there is both a legal and an equitable ownership, or on which there is a lien, is sold, in a proceeding for partition, the rights of the parties interested are the same, in the proceeds, that they were in the land. *Caldwell* v. *The Bank of Salem*, 20 Ind. 294.

We think the court erred in striking out the answer and cross complaint of Milligan, and also in overruling his demurrer to the petition of Poole and Magill.

Upon the facts as they appear in the record, Milligan was entitled to be paid his claim in full out of the purchase-money, if there was sufficient of it; and if there was not, he should have been allowed to retain the notes as evidence of his right to collect the residue when it became due.

We need not notice more particularly the cross errors assigned, as they are disposed of by what we have already said.

The judgment is reversed, with costs, and the cause remanded.

A. G. Porter, B. Harrison, W. P. Fishback, and *Davis & Maxwell*, for appellant.

J. Buchanan, for appellees.

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THE BOARD OF COMMISSIONERS OF FOUNTAIN COUNTY *v.* WOOD.

COUNTY COMMISSIONERS.—*Appeal.—Attorney.*—An appeal lies to the court of common pleas from a decision of the board of county commissioners on a claim for services as an attorney.

SAME.—*Pleading.*—In presenting a claim to the board of county commissioners, an account is all that is necessary, and on appeal a formal complaint need not be filed.

CIRCUIT COURT.—*Attorney.*—The circuit court is authorized to appoint an attorney to defend a person charged with a crime, and also to fix the amount of compensation for services so rendered.

APPEAL from the Fountain Common Pleas.

DOWNEY, C. J.—The appellee is an attorney at law, and was appointed by an order of the circuit court of Fountain county, to assist in the defense of a person charged with the crime of murder. For this service he presented his claim to the board of commissioners in the sum of three hundred dollars. The board allowed one hundred and fifty dollars, and refused to allow any more. Wood appealed to the common pleas, where he amended his claim by increasing the amount to five hundred dollars. The commissioners demurred to the complaint, or claim, and their demurrer was overruled. They then filed a general denial, on which the case was tried by the court; finding for the plaintiff for five hundred dollars; motion for a new trial overruled; and judgment for the plaintiff.

Two errors are assigned; first, the overruling of the demurrer; and, second, the refusal to grant a new trial.

The claim, as it was when presented to the court on demurrer, was a follows:

"FOUNTAIN COUNTY, TO SAMUEL F. WOOD, Dr.

To services as attorney, rendered by order and appointment of the circuit court of said county, at the August term, 1869, of said court, in the defense of the case of The State of Indiana *v.* Frederick Remster. - - - $500 00

Sept. 7th, 1869."

The objection to it, on demurrer, was that the court had no jurisdiction, and that the complaint did not state facts sufficient.

The first question is, had the common pleas jurisdiction? It is insisted that the appeal, in such a case, can only be taken to the circuit court, and not to the common pleas. This question has been decided both ways by this court, *The Board of Commissioners of Huntington County* v. *Boyle*, 9 Ind. 296, for; and *The Board of Commissioners of Wells County* v. *Weasner*, 10 Ind. 259, and *The Board of Commissioners of Huntington County* v. *Brown*, *id.* 545, against, the jurisdiction of the common pleas.

But in the last two cases the attention of the court seems

not to have been called to section 31, p. 253, 1 G. & H. We think the language of that section sufficiently broad to embrace this case, and, as said in the case in 9 Ind. *supra*, "this, being the later provision, governs," and renders it proper to appeal either to the common pleas or circuit court. See, also, *Wright, Auditor of Marion County*, v. *Harris*, 29 Ind. 438.

The facts stated in the claim, or account, are sufficient. No formal complaint in such a case is necessary. In presenting claims to the board of commissioners for allowance, it is sufficient to make out the account in the form used in this case, and the law does not contemplate the filing of a new complaint in the appellate court.

In arguing the question raised by the demurrer, the appellant's counsel insists that, as the county had already, by an order of the board of commissioners, retained an attorney to defend all poor persons prosecuted in the courts of the county, at a fixed compensation, the circuit court and the appellee were bound to take notice of this fact, and that the circuit court could not appoint the appellee to assist in the defense of the case to which reference is made in this case. And it is insisted that the circuit court has no power, in any case, to make an appointment which will be binding on the county, and render the county liable for the services.

This subject was considered by this court in *Webb* v. *Baird*, 6 Ind. 13, with reference to the Revised Statutes of 1843, and it was held that the county was liable, *ex necessitate*, for the value of the services of an attorney appointed by the circuit court to defend a poor person in a criminal action; but that the circuit court could not fix the measure of compensation. It was conceded in that case that there was then no statute expressly authorizing the court to appoint the attorney and render the county liable for his services.

Our present statute would seem not only to authorize the appointment, but also to confer authority to fix the amount of the compensation. It is provided, in the act to authorize and limit allowances by courts and boards, and drafts upon county treasurers, as follows:

"Sec. 2. The auditor may draw his warrant on the treasurer for a sum, the amount whereof, and the time when, and the person to whom, the same may be due, are fixed by law, or ascertainable from a public record, with proof of personal identity.

"Sec. 3. He may also draw his warrant upon the treasurer for a sum allowed, or certified to be due by any court of record, authorized to use a seal, and having jurisdiction beyond that of justices of the peace; or by the board of county commissioners.

"Sec. 4. The said courts may allow sums to persons serving as assistants to the sheriff, in preparing the court house for the reception of such courts, and in preservation of order, and in attendance upon juries, and to persons performing *any services* under the order of such court. But the number of such assistants employed shall never exceed the actual necessity of the case." 1 G. & H. p. 64.

Conceding that the fact was judicially known to the judge of the circuit court that the county commissioners had retained an attorney by the year to defend poor persons charged with crime, which we do not concede, it does not follow that there may not have been circumstances in this case, such as the disproportion, in numbers or talents, between the counsel for the State and those of the defendant, or in the gravity of the charge made against the defendant, which would have justified the court in assigning additional counsel in behalf of the prisoner. But it is not made to appear that the person whom the commissioners had appointed was in attendance at the court, or that the appellee was not appointed on account of his absence. This point is not well presented by the demurrer. The court committed no error in overruling the demurrer.

The second allegation of error, which is, that the court incorrectly refused to grant a new trial, cannot be sustained. The evidence justified the finding.

The judgment is affirmed, with costs.

J. Buchanan and *M. M. Milford*, for appellant.

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LEARY v. LANGSDALE.

UNLAWFUL DETENTION OF LANDS.—*Complaint.*—In an action to recover the possession of real estate, the complaint must describe the real estate with reasonable certainty.

SAME.—A complaint for the recovery of real estate must designate the county and state in which the land is situated.

PRACTICE.—*Motion in Arrest of Judgment.*—A complaint in an action to recover the possession of real estate which does not designate the county and state in which the land is situated, is bad on a motion in arrest. This defect is not cured by answer.

APPEAL from the Marion Common Pleas.

PETTIT, J.—This suit was brought before a justice of the peace, to recover possession of real estate, by the appellee against the appellant, under "an act concerning the unlawful detention of lands and the recovery thereof," 2 G. & H. 636, the first section of which reads thus: "That whenever, in pursuance of legal notice, or otherwise, any landlord or his legal representative shall be entitled to possession of lands, he may, by himself or his agent, have any tenant who shall unlawfully hold over, removed from such lands on complaint before a justice of the peace of the county in which such lands lie, specifying the matters relied on to justify such removal, and the damages claimed for detention, describing the premises with reasonable certainty."

There was a judgment before the justice for the appellee, and also on appeal in the common pleas court, from which last judgment the case is brought to this court. In the common pleas there was a motion in arrest of judgment, made at the proper time, because the complaint was not sufficient, which was overruled, and the ruling excepted to; and this is assigned for error. It is not necessary to notice any other of the proceedings of the court below, or assignments of error in this court. If the complaint is radically defective and insufficient, the judgment should have been arrested, and must be reversed here. 2 G. & H. 81, sec. 54; *McMillen* v. *Terrell*, 23 Ind. 163; Taylor on Landlord and Tenant,

sec. 721 *a*; *Bozley* v. *Collins*, 4 Blackf. 320; *Hill* v. *Stocking*, 6 Hill, 314. The following is the complaint.

"Said J. M. W. Langsdale complains of Patrick C. Leary, and says that, heretofore, to wit, on the —— day of ——, 1868, the plaintiff leased to one L. M. Whitman room number 2 in Langsdale block, in the second story, on lot in square 57, in the city of Indianapolis, at and for the rent of $16.66⅓ per month; that heretofore, to wit, on the —— day of ——, 1868, said Whitman transfered said lease to said Patrick C. Leary; that said Leary has wholly failed and refused to pay the rent for said premises; that more than ten days before this date, plaintiff caused a notice to be served on defendant, a copy of which is filed herewith and made a part hereof, requiring defendant to deliver up the possession of said premises at the end of ten days from the time of receiving the same; that there is now due up to this date the sum of fifty dollars rent which is now unpaid and now due; wherefore he claims judgment for possession of said premises and for sixty dollars damages for the detention thereof. Second paragraph. And for further complaint, the plaintiff says that defendant, heretofore, to wit, on the —— day of ——, 1868, peaceably entered into and took possession of room number — in Langsdale block, on Delaware street, in the city of Indianapolis; that since the first day of May, 1868, not at any time said defendant nor any one for him paid the rent for said premises or a part thereof; that defendant still holds possession and refuses to deliver up the possession of said premises or to pay the rent for said premises, and that said defendant still holds possession of said premises unlawfully; that said plaintiff is entitled to the possession thereof; that on the — day of July, 1868, said plaintiff caused a notice to be served on the defendant to quit and give up possession of said premises at the expiration of ten days from the date of receiving the same, a copy of which is filed herewith and made a part hereof. Wherefore, plaintiff demands judgment for the possession of said premises and fifty dollars damages for the detention thereof."

Many insufficiencies might be pointed out in this complaint, but it is enough to say that the complaint does not describe the property with any reasonable degree of certainty, nor does it state in what county or state it is situated. This is fatal, and is not cured by answer. 2 G. & H. 81 sec. 54.

The judgment is reversed, at the costs of the appellee, with instruction to the court below to sustain the motion in arrest of judgment.

P. C. Leary, J. W. Gordon, and *W. March,* for appellant.

L. Barbour and *C. P. Jacobs,* for appellee.

LEFFEL *v.* LEFFEL.

PRACTICE.—*Special Finding.—Exception.*—Where the court finds the facts specially, and states the conclusions of law thereon, an exception to the *finding* will not raise the question of the correctness of said conclusions;—exception must be taken to said conclusions, or no question thereon can be presented on appeal.

SAME.—*Answers by Jury to Interrogatories.*—The answers to interrogatories made by a jury discharged without agreeing form no part of the record.

SAME.—*Refusal to Instruct Jury.*—Where the jury are discharged without agreeing, and a second trial had, the refusal of the court to give instructions upon the first trial cannot be assigned as error.

DIVORCE.—*Right to Jury Trial.*—It is discretionary with the court to allow or refuse a jury trial in divorce cases.

SAME.—*Effect of Verdict.*—The court is not absolutely bound by the verdict of a jury in divorce cases, but may disregard the verdict and determine the case for itself.

APPEAL from the Wabash Common Pleas.

DOWNEY, C. J.—The appellee filed a petition for a divorce against the appellant, representing that she had abandoned him; that they had one child; that the appellant had also abandoned it, leaving it with him; that she had frequently threatened to take the life of the child; and that she had also threatened to take the life of the petitioner. Wherefore, she asked for a divorce and for the custody of the child.

The defendant filed an answer in denial of the petition, and also a cross petition, in which she charged the appellee with getting the child away from her by false pretenses, and then driving her away from his house by threats and violence. She also charges him with cruel treatment of her, failure to provide for her, and with the crime of adultery with a female, who is named in the cross petition. She states the value of the property of the appellee, and asks a judgment for a divorce, for alimony, and the custody of the child.

The appellee answered the cross petition by a general denial.

The record informs us that the issues were submitted to a jury for a "special verdict;" and that after hearing a portion of the evidence, the court does now "dissolve the jury."

Afterwards the case was submitted to another jury, and the court propounded to them interrogatories to be answered, and the interrogatories, with answers to most of them, are in the record, but the record says the jury failed to agree to all the interrogatories, and were discharged by the court.

The defendant moved the court for another jury, which was refused. The court then, of its own motion, proceeded to find upon the issues. The defendant demanded that the court should state the facts in writing, and then the conclusions of law thereon, with the view of excepting to the decisions of the court on the questions of law, &c.; which the court did, and decided that the defendant should have a divorce decreed to her, with three hundred dollars of alimony, but decreed that the petitioner, the father, should have the custody of the child, until, &c.

There was a motion for a new trial by the defendant, which was overruled. The defendant then moved the court for judgment for the custody of the child, on the facts found; which motion was also overruled; and the court rendered judgment according to its finding.

It is insisted by counsel for the appellant that the conclusions of law by the court upon the facts stated were incorrect. But it is not shown that there was any exception ta-

ken by the defendant to such conclusions of law. There was an exception to the finding, which we suppose relates to the facts, and not to the conclusions of law. Without an exception to the conclusions of law, the question as to the correctness of such conclusions is not before us. *Peden's Adm'r* v. *King*, 30 Ind. 181.

As the jury was discharged without agreeing upon or returning a verdict, we cannot regard the interrogatories and answers of the jury to a part thereof as properly in the record, for any purpose.

The defendant asked the court to submit to the jury certain questions framed by her counsel, which the court declined to do, but submitted questions of its own framing to be answered by the jury. The defendant also asked certain instructions to be given to the jury, which was also refused. But as the jury did not agree on a verdict, but were discharged, we cannot see that the defendant was injured by this action of the court, any more than she would have been if the case had been retried by another jury, instead of being tried by the court. The same may be said as to the demand by the defendant that the court instruct the jury to find a general verdict. If it could have been rightfully, in any case, demanded, it is not an error of which the defendant can now complain.

It is claimed that the judgment should be reversed because the court refused to allow another trial by jury. But we do not think so. It was discretionary with the court whether to allow a jury trial or not, in the first place; and the jury which was empanelled having failed to agree, we think the case stood then as it did before the jury was empanelled, and that the court might then, as before, allow or refuse a jury trial. See *Lewis* v. *Lewis*, 9 Ind. 105; *Morse* v. *Morse*, 25 Ind. 156.

But the court, of its own motion, found upon the issues, without rehearing the evidence; and it is urged by the appellant that this was error. It seems to us that there was no necessity for the court to have the evidence repeated,

which had just been given in the hearing of the court as well as of the jury. If the jury had agreed upon and returned a verdict, it is decided that the court would not have been absolutely bound by it, but might have disregarded it, in whole or in part, for sufficient reason, and determined the case for itself upon the evidence. *Lewis* v. *Lewis, supra.* When the jury had failed to agree and were discharged, the case remained before the court to be disposed of according to the evidence, as it would have been before the court for decision on the verdict and the evidence, if the jury had returned a verdict.

But it is insisted, finally, that the finding of the court upon the facts is not sustained by the evidence, so far as it relates to the questions controlling the judgment for the custody of the child. The court found some acts of ill temper and cruelty on the part of the mother towards the child, and some declarations by her indicating a great want of affection for it. The court also found that the father had been guilty of all that was imputed to him in the cross petition. We have examined the evidence, hoping to find a want of sufficient evidence to sustain the finding of the court with reference to the mother's feelings for the child, and her treatment of it. But we are compelled to say that there was evidence from which the court might well find as it did. Many of the witnesses exhibited much feeling; some of them were impeached, in different ways; and there was great conflict in the evidence. Under these circumstances, we cannot disturb the finding of the court upon the facts.

If circumstances shall hereafter justify a change of the custody of the child, it can be ordered by the court below.

The judgment is affirmed, with costs.

J. U. Pettit, and *Taylor, & Brenton,* for appellant.

J. D. Conner, for appellee.

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SAWYER v. THE STATE.

EVIDENCE.—*Criminal Law.—Murder.*—On the trial of one for the murder of his wife, he offered to prove that the deceased had for a long time been having adulterous intercourse with one B. and others, and that he (the defendant) had for a long time been cognizant of the adulterous conduct of his wife.

Held, that the evidence offered was incompetent in justification or palliation of the offense; that after the lapse of time sufficient for the passion to cool and for reason to assume her sway, the killing was as criminal and indefensible as if the deceased had never been guilty of conjugal infidelity.

SAME.—*Insanity.*—Said offered evidence, in the absence of evidence tending to show the actual insanity of the defendant, was incompetent as tending to show insanity.

SAME.—A jury is not authorized to find a man to be insane, without proof on the subject other than the fact that a cause existed that might tend to produce insanity.

INSTRUCTIONS.—*Argument of Counsel.*—Where the whole case is fully and fairly placed before the jury in the series of instructions given, it is not error for the court to specially refer to and state the position assumed in the argument of counsel, upon a question in the case made prominent by the argument.

SAME.—*Insanity.*—Where the defense of insanity is interposed to a criminal prosecution, the court may direct the attention of the jury to the defense, and instruct them that the evidence relating to it should be carefully and intelligently scrutinized and considered.

APPEAL from the Vanderburg Criminal Circuit Court.

WORDEN, J.—The appellant was indicted for, and tried, and convicted of, the murder of his wife, Lizzie Sawyer, and sentenced to be executed. The case made against the accused by the evidence is, in substance, as follows:

The deceased, at the time of the homicide, was employed as chamber maid on the steamboat G. W. Thomas, which was then lying at the wharf in the city of Evansville, in Vanderburg county, in this State. On the morning of the 2d of February, 1871, one Delia Wilson, an acquaintance of the deceased, went on board the boat to see her. Soon after Delia Wilson went on board, the accused went on board the boat, and went to that part of the boat where the deceased and Delia Wilson were. The witness to this part of the transaction, Delia Wilson, says, that the accused did not seem to be angry, but spoke to her and the deceased very

pleasantly, and enquired after their health, and sat down by a table where the deceased was ironing. All three of the parties talked and laughed together for a while. After some casual conversation, the accused asked the deceased if she would go and live with him if he would get a house off Water street. The deceased made him no answer. The witness, Wilson, asked her why she did not answer him. The deceased replied, that the accused always came to her drunk, and that was the reason she wouldn't talk to him. The accused then asked the deceased, addressing her as "baby," if she would go and live with him if he would get a house in another portion of the city; to which she replied that he knew her mind was made up; that she had told him, when the boat was in port on the last trip, what she was going to do; that she then told him she never intended to live with him again. In the mean time, the accused had got up from where he had been sitting, and moved two or three steps, taking a seat near where the smoothing irons, which the deceased was using, were sitting. At the point of the conversation above stated, the appellant seized one of the irons, weighing between four and five pounds, and struck the deceased on the head therewith. He struck her twice before she fell, but kept on striking after she had fallen, as the witness says, as much as two dozen times. The witness became frightened, and ran into the pantry of the boat, and fastened the door, but she heard the deceased screaming for a minute or two after that, and then she ceased. When the witness came out of the pantry, she saw the appellant jumping from the boat to the river bank, with the smoothing iron in his hand. This witness also testifies that on the day before the murder she talked with the appellant, when, as she says, he seemed to think the deceased "had been spending his money on another man." The deceased had been in the boat about a month.

Edward Green, the cabin boy of the boat, heard screams of murder from the direction of the stern of the boat, and ran and opened the door leading from the ladies' cabin to

the washing and ironing room, and there saw the prisoner have the deceased down on the floor, with his knees on her breast, striking her on the head with the smoothing iron. When the witness opened the door, the prisoner ran at him and told him to get out or he would kill him. The witness ran out, when the accused shut the door and bolted it, and then began beating the deceased again. The porter of the boat came and broke the door open, at which time some six persons had gathered around, and the appellant, swearing he would kill all of them if they did not get out of the way, ran down on deck, and jumped off the boat. When the appellant left the boat, the parties went to where the deceased was lying, and found she was dead. Her head was brutally and horribly mangled.

After the appellant left the boat, it appears that he ran about two miles from town, but then returned and surrendered himself up to the officer, saying that he had concluded to come back and surrender himself up, because he knew he would be pursued and taken. He said, at different times after the murder, that if he had not killed the deceased, he had failed to do what he intended; that he killed her because she had been sleeping with one Bibbs and others, and that he only regreted that he could not kill Bibbs also. He also said he was now satisfied, and they might hang him, shoot him, or do what they pleased with him.

It was proved by another witness, who had some acquaintance with the appellant and his wife, that she did not know why the deceased left home to go on the boat, but that she was kept by another man by the name of Bibbs. On one occasion the appellant came home, and after talking with the deceased awhile about her conduct with other men, he said to her that if she did not quit running with other men he would smother her in her heart's blood; to which she replied, "well, then, you can kill me," and left the room. On another occasion, about three weeks before the murder, the appellant said to the deceased, that if she did not behave herself and quit running with other men, he would kill her.

It appears by the evidence that the appellant is below the average of mankind in point of mental capacity and intelligence, but he appears to us to have had abundant mind to be in every way responsible for his conduct; and we may add that, although there was evidence given to show, in the language of the bill of exceptions, "the causes that tend to produce temporary insanity," there was nothing in the case that shows any mental derangement on the part of the accused.

The appellant offered to prove "that the deceased, Lizzie Sawyer, had, for a long time previous, been having adulterous intercourse with a man by the name of Bibbs and others, of which adulterous conduct the defendant had, for a long time, been cognizant." This evidence was rejected, on objection made by the State, and the defendant excepted. This evidence, offered with a view to justify, or in any way palliate the offense, was utterly incompetent, and correctly rejected. It assumes that the defendant had, "for a long time," been cognizant of his wife's adultery. If he had been thus for a long time apprised of her guilt in that respect, there had been an abundance of time for the ebullition of passion, which might be supposed to arise on being first apprised of the fact, to subside. After the lapse of time sufficient for the passions to cool, and for reason to resume her sway, the killing was just as criminal and indefensible as if the deceased had never been guilty of conjugal infidelity. We do not determine what might have been the effect of the adultery of the deceased, had the homicide been perpetrated by the appellant immediately upon discovering the fact. It is sufficient to say that if the facts offered to be proven were established, they would, in no way, excuse or mitigate the offense. *State* v. *Samuel*, 3 Jones (N.C.), 74; *State* v. *John*, 8 Ired. 330. There might be numerous authorities cited upon the point, both ancient and modern, but it is deemed unnecessary.

It is claimed, however, that the evidence should have been permitted to go to the jury, on the ground that it tended to

establish the insanity of the accused. It appears to us that the appellant had the full benefit, on the trial, of the fact that he believed that the deceased had been guilty of continued adultery, if that belief had any tendency to produce mental derangement. His statements, before and after the murder, show that he entertained that belief, or perhaps we should say, that he knew the fact. But the evidence, as offered, was incompetent for that purpose.

It was testified by a physician, that "any excitement, an impression that a great wrong has been inflicted upon a man, protracted thought upon any subject, and others that might be enumerated," are causes that tend to produce temporary moral insanity. It is claimed, as we understand the argument, that inasmuch as the infidelity of the deceased was a great wrong inflicted upon the defendant, and inasmuch as his mind would protractedly dwell upon the subject, the evidence was competent, as tending to show the existence of an exciting cause of insanity.

This argument assumes that a jury may infer the existence of insanity from proof merely of the existence of a cause that may tend to produce it, without any proof whatever that the effect followed the cause. If it were a case where a given effect *must* follow the cause, there would be force in the argument, because proof of the cause would be proof of the effect. But we know that the various causes that may tend to produce insanity very frequently fail to produce any such effect; and it seems to us that it is not competent to prove the existence of such exciting cause unaccompanied with some proof that the effect followed the cause. Indeed, a jury would not be authorized to find a man to be insane, without proof on the subject other than the fact that a cause existed that tended to produce insanity. Thus, in the case of *Bradley* v. *The State*, 31 Ind. 492, the court below charged the jury, that "if it had been proved that the mother of the defendant was insane, and that insanity in the mother raises a strong presumption that it is transmitted to the offspring, yet it rests upon the defendant to prove that he was insane

at the time the act was committed. The facts that the mother was insane, that the twin brother of the mother was also insane, and that a cousin was insane, if proved, would not be sufficient, of themselves, to show insanity in the defendant, but are facts strongly tending to show hereditary insanity in the family, and proper for you to consider with the other testimony in the case, to aid you in determining whether the defendant was insane or not, when the act was committed." This charge was held to be correct.

The evidence offered was not accompanied with any offer of evidence to prove the actual insanity of the defendant, nor was there any evidence introduced that had any legitimate tendency to prove insanity; and, whatever might have been the law of the case had evidence been introduced or offered, in connection with that rejected, tending to prove the defendant's insanity, we think the evidence, as offered, was rightly rejected.

The appellant moved for a new trial, upon the ground, amongst other things, that the court erred in giving the first, second, third, fourth and eighth, instructions to the jury.

The charges given to the jury are too long to be here set out in full, but we find no error in them. They place the whole law of the case before the jury in quite as favorable a light as the appellant could ask. No objection is pointed out in the brief of counsel for appellant to any of the charges except the second, which is as follows. "If you shall find from the evidence that the prisoner, Sawyer, did the killing as charged in the indictment, then the next question for you to determine is, was the prisoner justifiable or excusable to any extent upon any of the grounds mentioned? The ground relied upon by the defense in this case to overcome this presumption of malice" (the presumption arising from the use of a deadly weapon, as explained in a previous charge) "is that of insanity. In other words, it is argued in behalf of the prisoner, that at the time of the commission of the act alleged in the indictment, he was not of sound mind, and, therefore, not responsible for the acts committed by him.

This defense is one very frequently made in cases of this kind, and it is one which, I may say to you, should be very carefully scrutinized by the jury. The evidence to this point should be carefully considered and weighed by the jury, for the reason that if the accused were in truth insane at the time of the commission of the alleged acts, then he ought not to be punished for such acts. The evidence on this question of insanity ought to be carefully considered by the jury for another reason, and that is, because a due regard for the ends of justice and the peace and welfare of society demands it, to the end that parties charged with crime may not make use of the plea of insanity as a means to defeat the ends of justice, and a shield to protect them from criminal responsibility in case of violation of law.

"It is not every slight aberration of the mind, not every case of slight mental derangement, that will excuse a person for the commission of an act in violation of law. The great difficulty is to determine, in cases where insanity is urged as a defense, the degree of insanity that will excuse a person for an act, which, if committed by a sane person, would be criminal, and would subject the offender to punishment.

"If you believe from the evidence that at the time of the alleged killing (if you shall find from the evidence that there was a killing as alleged in the indictment) the prisoner, Sawyer, was so far insane as not to be able to distinguish between right and wrong with respect to the act in question; or if you shall find from the evidence that he was urged to the commission of the act by an insane impulse so powerful as to overcome his will and judgment, so powerful that he was unable to resist it, even though he might know and feel that the act he was committing was wrong and a violation of law, no matter whether such insane impulse arose from mental or physical causes, or both, provided they were not voluntarily induced by himself; or if you should find from the evidence, that the prisoner was insane on any subject, no matter upon what, provided you find the insane impulse to do the act charged in the indictment arose from such in-

sanity, then, in contemplation of law, he would be insane, and you should acquit him."

It is objected to that portion of the charge which informs the jury that "the ground relied upon by the defense in this case to overcome the presumption of malice is that of insanity," that it diverted the minds of the jurors from the other grounds relied upon to overcome the presumption of malice, and was calculated to confuse and mislead them. Looking at the case as it appears to us from the evidence, and considering the circumstances and character of the homicide, and the instrument with which, and the manner in which, it was perpetrated, it is difficult to conceive of anything that would overcome the presumption of malice, unless it be a disordered and shattered intellect. But we do not think the court erred to the injury of the accused in giving undue prominence to the defense of insanity. In the series of charges, including that above set out, the whole case was fully and very fairly placed before the jury, and the prisoner had the full benefit of the law as applicable to his case. It may be further observed that in that portion of the charge above objected to, the court was but stating the case as it was argued to the jury by the counsel for the defendant, for the charge immediately proceeds as follows: "In other words, it is argued on behalf of the prisoner, that at the time of the commission of the act alleged in the indictment, he was not of sound mind," &c. We cannot say that the court misstated the positions of counsel or gave more prominence in the charge to the question of insanity than the counsel did in the argument.

It is also objected to the charge that it was calculated to prejudice the jury against the defense of insanity; that the jury were unduly cautioned to carefully scrutinze the evidence on that subject.

The observations of the court in that respect meet our unqualified approval. As stated by the court, where the defense of insanity is interposed to a criminal prosecution, the evidence relating to it should be carefully and intelligently

scrutinized and considered, for the double reason that a really insane person should not be convicted, and a really sane one should not be acquitted and suffered to go unpunished for his crimes, on the false theory of insanity.

We find no error in the case, either in relation to the evidence or the charge of the court, and are satisfied from the evidence that the verdict and judgment are in all respects right.

The judgment below is affirmed, with costs.

T. L. Davis and *J. G. Hollingsworth*, for appellant,

W. P. Hargrave and *B. W. Hanna*, Attorney General, for the State.

SEXTON v. SEXTON.

PLEADING—*Complaint.*—A. sued B. for contribution, alleging in his complaint that he and B. made their note to C. and that afterwards A. had paid the entire amount due on the note, that B. has never paid him one half of said note, &c. A copy of the note is filed with the complaint, and reads, "we promise to pay," &c., and is signed by A. and B.

Held, that in the absence of an allegation to the contrary, it will be presumed that A. and B. were both principals, and the complaint is therefore sufficient to entitle A. to recover one moiety of B.

STATUTE OF LIMITATIONS.—Such a suit is not based on any promise contained in the note, but on an implied promise raised on account of the plaintiff's having paid more than his share of the joint indebtedness; and the statute of limitations will bar the claim of the plaintiff after the lapse of six years from the time of payment.

PLEADING.—*Answer.*—An answer that the defendant had been sued once before on the same note, without alleging the result of the action, is bad.

SAME.—Also an answer by B. that he and A. had indorsed a note for W., and it was agreed between A. and B. that W. should mortgage certain real estate to indemnify them, and that W. made the mortgage, and that it had been fully paid off to A., is bad.

APPEAL from the Greene Common Pleas.

DOWNEY, C. J.—This action was brought by the appellee against the appellant, before a justice of the peace, for contribution. The defendant answered, first, the general denial;

second, that he had been sued on the same demand once before in the common pleas of that county, but without alleging what was the result of the suit; third, that the plaintiff and defendant had indorsed a note as sureties for one Walker to one Stalcup; that it was agreed by Walker and plaintiff and defendant that Walker should mortgage certain real estate to indemnify them; that Walker accordingly executed the mortgage; and that said mortgage had been fully paid off to said plaintiff; fourth, that as the suit was brought on an open account, all the items having been due for six years, the defendant pleads the statute of limitations. There was a trial by jury and verdict and judgment for the plaintiff. The defendant appealed to the common pleas, where there was an amended paragraph, setting up the statute of limitations, filed by the defendant, alleging that the cause of action did not accrue within six years before the commencement of the action. The plaintiff demurred to the second, third, and fourth paragraphs of the answer, because "neither one of them states facts sufficient." The demurrer was sustained to the second and third, and overruled as to the fourth. Both parties excepted. There was then a trial by jury and a verdict for the plaintiff. The defendant moved the court for a new trial, for the following reasons: that the finding of the jury was contrary to law, not sustained by sufficient evidence, and that the damages were excessive. This motion was overruled, and final judgment rendered on the verdict.

Three questions are presented by the assignment of errors: first, as to the sufficiency of the complaint; second, as to the sufficiency of the second and third paragraphs of the answer; third, as to the correctness of the ruling of the court in refusing a new trial.

The complaint is as follows: "State of Indiana, Greene county, ss. In the court of George W. Beard, justice of the peace of Center township. Lemuel B. Sexton *v.* John G. Sexton.

Lemuel B. Sexton, plaintiff, complains of John G. Sexton,

defendant, and says that on the 10th day of January, 1860, the said plaintiff and defendant, by their promissory note, a copy of which is filed herewith, promised to pay to the order of Wm. Stalcup, Wm. Haltsdaw, James G. Stalcup, and Squire Graves, under the name and style of Hance Stalcup's heirs, the sum of two hundred and forty-seven dollars and eighteen cents, with interest from date; that on the 7th day of January, 1861, said plaintiff paid on said note the sum of fifty dollars, that on the 22d day of January, 1861, said plaintiff paid on said note the sum of one hundred and two dollars; the 12th day of April, 1861, said plaintiff paid on said note the sum of twenty dollars; that on the — day of ——, 1861 or 1862, said plaintiff paid the remainder of said note, principal, and interest, and that said last payment was never credited on said note; that said defendant John G. Sexton has never paid said plaintiff the one-half of said note, principal and interest, paid by said plaintiff for said defendant on said note, although often requested so to do; wherefore," &c. The note is as follows:

"$247.18. Bloomfield, January 10th 1860.

On or before the 25th day of December, 1860, after date, we promise to pay to the order of Hance Stalcup's heirs two hundred and forty-seven dollars and eighteen cents, for value received, without any relief whatever from valuation, appraisement, or stay laws, with interest from date.

LEMUEL B. SEXTON.
JOHN G. SEXTON."

Indorsed on the note are sundry payments, not showing, however, by whom they were made.

It must be presumed that the makers of this note were both principals, in the absence of anything alleged or shown to the contrary. It might have been alleged and shown, if such was the fact, that one was security for the other. But without anything alleged or proved to the contrary, we must regard the makers as both being principals, and equally bound to pay the note. It follows, that if one of them paid the whole amount of the note, or more than his moiety thereof,

he had a claim against the other for contribution. The plaintiff alleges that he paid the whole amount of the note, and it must be concluded that he has a claim to the extent of one half the amount, for contribution, against the defendant. The complaint shows that the plaintiff had a good cause of action, and was therefore sufficient. See *Laval* v. *Rowley*, 17 Ind. 36; 1 Parsons Con. 31, *et seq.*

The next point is as to the sufficiency of the second and third paragraphs of the answer. The second was clearly bad. The mere fact that the defendant had been sued on the same damand once before is no bar to this action. In criminal prosecutions, when the defendant has been once in jeopardy he cannot be again prosecuted for the same crime. But that rule does not apply in civil actions. For aught that appears, the former action was dismissed, or otherwise disposed of without any final judgment. The third paragraph of the answer, we think, was also bad. There is no connection shown between the note which was indorsed by the plaintiff and defendant for Walker and the note filed with the complaint; and the fact that the mortgage was "fully paid off" does not show a satisfaction of this claim. If it was designed to show by this paragraph that payment had been made of the claim for which this action is brought, the paragraph was unnecessary, as payment may be proved, in a suit instituted before a justice of the peace, without being specially pleaded. 2 G. & H. 585, sec. 34. The same matter was admissible as well without as with the paragraph of payment pleaded; and therefore it would not have been error if the demurrer had been improperly sustained to the third paragraph.

The only other question relates to the propriety of the action of the court in refusing a new trial.

The evidence shows that the payments made by the plaintiff on the note were made at the times stated in the complaint, except as to the last amount, which was not paid at all, but the plaintiff gave his own note therefor, and took up the joint note in 1861 or 1862.

One question is as to the period of limitation in such a case. The defendant insists that it is six years, while the plaintiff contends that the action is on the note, and that it is not barred until after the lapse of the same time which would have barred the action of the payee on the note.

Whatever might have been the case had the joint note been merged in a judgment, and the payment made on or in satisfaction of the judgment, under 2 G. & H. 309 and 310, secs. 676 and 679, we are of the opinion that this must be regarded as an action for money paid by the plaintiff for the benefit of the defendant, not based on any contract or promise contained in the promissory note, but on the implied contract, which the law makes, on account of the plaintiff having paid more than his equal share of the joint indebtedness. It is true that the note is a material part of the evidence necessary to a recovery, but it is not of itself sufficient to make out a case. It shows the relation in which the parties stood to each other with reference to the contract, but is not the cause of action. The action was commenced on the 9th day of October, 1869, and the payments made by the plaintiff were all made more than six years before that time. We think, as this was merely an action for money paid, that it was barred in six years from the time of the payment. This is not a case where the equitable doctrine of subrogation is applicable, or sought to be applied. See *Neilson* v. *Fry*, 16 Ohio St. 552; 1 White & T. Lead. Cas. 78, *et seq.*

The other facts in the case make us quite willing to apply the bar of the statute to the claim, and we think fully justify the policy of such enactments.

The judgment is reversed, with costs, and the cause remanded, with directions to the common pleas to grant a new trial.

BUSKIRK, J., having been consulted as counsel, was absent.

W. M. Franklin, for appellant.

D. E. Williamson and *A. Daggy*, for appellee.

STAFFORD and Another v. NUTT and Others.

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PARTITION.—*Pleading.—Cross Petition.*—A claim of defendants in a suit for partition, for the value of improvements made on the real estate, must be presented by cross petition, and should be filed before the judgment of partition and the appointment of commissioners; but it is not error for the court, in its discretion, to entertain such petition for the adjustment of the rights of the parties, after the commissioners have filed a report of partition.

SAME.—*Improvements.*—Where a report of partition has been made, and a cross petition for the adjustment of improvements has thereafter been filed, and the value of improvements made by the defendant ascertained, the plaintiff has a right to pay his share of the value of the improvements, in money, and retain his full share of the common property; and if the plaintiff so elects to pay in money, the report of the commissioners should be affirmed; and in such case, it is error to vacate the original judgment of partition, and proceed anew to render judgment and appoint new commissioners to make partition.

APPEAL from the Montgomery Circuit Court.

WORDEN, J.—This was a petition for partition by the appellants against the appellees. The land to be parted belonged to Edmund Nutt, who died, leaving it to his heirs, the plaintiff Lucinda, formerly Lucinda Nutt, and the defendants, Jonathan, John, Aaron, Sandford, and William Nutt. There was a large quantity of land, amounting in value to over one hundred thousand dollars. The land was to be divided into six equal parts, or rather, the plaintiff Lucinda was entitled to one-sixth part thereof.

The defendants appeared and filed their answer, admitting the allegations of the petition as to heirship and ownership of the land, but asking that there be no partition of their shares of the land, desiring to hold the same in common.

The cause was submitted to the court for trial, and the court found that the plaintiff Lucinda and the defendants were the owners of the land in fee simple, as tenants in common. Judgment of partition was awarded, and that one-sixth of the land in value be assigned and set apart, by metes and bounds, to said Lucinda Stafford, and that the residue of the premises be assigned and set apart to the defendants, so that they might hold the same in common. Accordingly,

Thomas Beard, John Lee, and Cornelius Canine were appointed commissioners to make the partition, who, on the 21st day of September, 1867, returned into court their proceedings under the order, showing that they had parted the land in pursuance of the order of the court. Up to this point the proceedings all seem to have been regular and proper.

At the March term of the court, 1868, the defendants filed objections to the confirmation of the report of the commissioners. The substance of the objection to the report is, that each of the defendants had been in the possession of separate parcels of the land, had made lasting and valuable improvements thereon since the death of their ancestor, and that the commissioners estimated the land as if the improvements had been made by their said ancestor. Wherefore, they claimed that the partition thus made was unequal and unjust towards them, and that the report of the commissioners ought not to be confirmed. They alleged, as a reason why their claim for improvements was not set up before, or at the time the judgment of partition was rendered, that, although they then knew all the facts, they were "uninformed and mistaken in regard to their right in said suit to have their claims adjusted for said improvements," &c. They prayed that the judgment of partition be set aside, and that the defendants be permitted to set up the facts by way of cross petition. The court thereupon set aside the interlocutory order or judgment for partition, and gave the defendants leave to file a further answer.

The defendants then filed an answer, admitting all the allegations in the petition, and asking that the share of each defendant be set off to him in severalty; and by way of cross petition setting up their claims for improvements, and asking that the same be adjusted.

Issues were made up, and the cause, as to the improvements, was submitted to a jury, who returned, by way of answers to interrogatories, the amount of improvements made by each of the defendants since the death of their ancestor. The plaintiff then offered to pay into court for the

use of the defendants, her share of the value of said improvements, and moved the court that upon such payment, the order of the court setting aside the interlocutory judgment of partition be set aside, and that the report of the commissioners be confirmed; but the court overruled the motion, and the plaintiff excepted.

The court then proceeded to try the partition branch of the case anew, and after having found that the plaintiff Lucinda and the defendants were each entitled to an undivided one sixth of the premises as tenants in common, proceeded to render judgment of partition thereof, and appointed new commissioners for that purpose, who subsequently made their report, setting off the share of each of the parties in severalty.

The plaintiff filed objections to the report of these commissioners on the ground, chiefly, that the land set apart to her was not one-sixth in value of the whole, and not equal in value to the share set apart to each of the defendants, and a jury was empaneled to try this question, who returned, in answer to interrogatories, that the value of the whole land was one hundred and three thousand six hundred sixty-nine dollars; that the share set apart to the plaintiff was of the value of seventeen thousand one hundred fifty-four dollars; and that her share as thus set off to her was not equal in value to one sixth of the whole. The plaintiff moved for a new trial of the question thus submitted to the jury, on the ground of error in excluding evidence offered by the plaintiff and erroneous instructions, but the court overruled the motion, exception being taken by the plaintiff; and thereupon the court ordered that the report of the commissioners (the last set) be confirmed, on the defendants paying to plaintiff the sum of one hundred and twenty-four dollars and sixteen cents, to make her share equal to one sixth of the whole.

We have thus stated the leading features of the record, omitting, however, many matters unimportant to an understanding of the ground upon which we place the cause. We may observe that the plaintiff offered evidence on the trial

of her objections to the report of the last commissioners, which was rejected, but which we think was competent; but in our opinion an error was committed in an earlier stage of the cause.

The claim for the adjustment of the improvements, we have seen, was not made until after the judgment of partition, the appointment of commissioners, and the return of their report into court. The claim for improvements could only be properly made by cross petition. *Martindale* v. *Alexander*, 26 Ind. 104. Regularly, the cross petition should have been filed before the judgment of partition and the appointment of commissioners, in order that the rights of the parties might have been adjusted and the duty of the commissioners clearly pointed out.

There is no very substantial reason alleged why this was not done, but we have concluded, as the matter was much in the discretion of the court, to hold that it was not erroneous to entertain the cross petition for the adjustment of the rights of the parties in respect to the improvements at the time it was done. But when the value of the improvements had been ascertained by the verdict of the jury, the plaintiff very clearly had the right to pay her share of the value of the improvements, and have the partition and report of the commissioners confirmed. She offered to make such payment, and asked such confirmation. No other question in the cause remained to be settled or ascertained. Whether payment *in money* can in any case be coerced, for improvements made by one tenant in common, without the consent or request of his co-tenant; or whether the adjustment must be made in the division of the property by setting off to the party making the improvements the improved portion, or a greater share in value of the property than he would otherwise be entitled to, are questions that do not arise in the record, and we, therefore, express no opinion upon them.

But we are very clearly of the opinion that where improvements have been thus made by one tenant in common, his co-tenant has a right to pay his share of the value of the

improvements in money, and retain his full share of the common property.

In this case, the plaintiff elected to pay in money for her share of the value of the improvements, and this she had an unquestionable right to do; and, therefore, we think the court erred in overruling her motion to set aside the order vacating the original judgment of partition, and to confirm the report of the commissioners first appointed.

The judgment below is reversed, back to the return of the verdict of the jury as to the value of the improvements, with costs, and the cause remanded, with instructions to the court below to confirm the original judgment of partition, and the report of the commissioners first appointed, viz., Thomas Beard, John Lee, and Cornelius Canine, upon the payment by the plaintiff into the office of the clerk of the court below, for the use of the defendants who may be entitled thereto, of a sum equal to one-sixth of the value of the improvements made on the land by the defendants, or such part of said sum as may remain unpaid, the value of the improvements to be determined by deducting therefrom the value of the materials taken from the land for such improvements, as found by the jury.*

J. Buchanan, for appellants.

J. McCabe, for appellees.

* Petition for a rehearing overruled.

THE CITY OF COLUMBUS and Others *v.* STOREY and Others.

COMMON COUNCIL.—*Sewers.*—The common council of the city of Columbus, under the provisions of the 43d subdivision of section 53 of the act for the incorporation of cities, approved March 14th, 1867, passed an ordinance in

July, 1869, for the construction of a sewer, defining the route along which it should be constructed, the material to be used, and size of the sewer, declaring what real estate would be benefited by the construction of the same, and directing that the cost be assessed against the owners of the real estate benefited. In August thereafter, another ordinance was passed, to provide for the extension of the sewer, changing also the character of the material to be used, as well as the size of the sewer, but not declaring any change in the real estate benefited. The cost of the sewer was apportioned by the engineer among the owners of the lots designated as benefited in the first ordinance, and the owners required to pay the amounts assessed against them. Suit by the owners to enjoin the collection of the assessments.

Held, that the common council could not change the character of the work and extend it over other portions of the street, and still charge its cost upon the same property which would have been benefited by the construction of the sewer provided for in the first ordinance.

APPEAL from the Bartholomew Common Pleas.

DOWNEY, C. J.—This action was brought by the appellees against the appellants, to enjoin the collection of certain assessments made against their lots to pay the cost of the construction of a sewer.

The court granted a temporary restraining order or injunction, from which the appeal is taken. The provision in the present law with reference to the incorporation of cities on this subject is as follows:

"The Common Council shall have power to enforce ordinances: * * * * * * * * * To construct and regulate sewers, drains and cisterns, and provide for the payment of the cost of constructing the same; to cause the same to be done by contracts given to the best bidder, after advertising to receive proposals therefor; to provide for the estimate of the cost thereof, and the assessment of the same upon the owners of such lots and lands as may be benefited thereby, in such equitable proportion as the Common Council may deem just, which estimate shall be a lien upon such lots and lands, and may be enforced by sale of the same, in such manner as the Common Council may provide."

Acts of 1867, p. 58, sec. 53, subdivision 43.

On the 19th day of July, 1869, the city council adopted the

following ordinance: "An ordinance to provide for the construction of a sewer on Harrison street, declaring what property is benefited thereby, and assessing the expense thereof upon such property.

"Be it ordained by the common council of the city of Columbus.

"Sec. 1. That a sewer shall be constructed on Harrison street in said city, from the alley between Washington and Franklin streets to the west side of the Jeffersonville, Madison, and Indianapolis Railroad, near the western terminus of said Harrison street. Said sewer shall be placed on the line of the south gutter of said street, and shall be made with a fall of four inches to each one hundred feet of the length thereof. It shall be made of glazed stone-ware draining tile, or pipes, of the inside diameter of twelve inches; the tile, or pipe, to be of same quality and kind as the sample now in possession of the authorities of said city. The inlet and outlet of the sewer shall be constructed of blue limestone, —— feet long, the same at the entrance of the sewer, to be two feet wide at the mouth and one foot deep. The top to be covered with a flagstone that can be removed for the purpose of cleaning the sewer.

"It is declared that the following real estate in said city will be drained and benefited by said sewer, to wit: all the real estate on Harrison street between the track of the J., M., & I. R. R. and the alley between Mechanic and Pearl streets; all the real estate on Franklin street between Delaware street and the track of J., M., & I. R. R.; all the real estate on Mechanic street between the first alley south of Jefferson street and the track of the Columbus and Shelby branch of the J., M., & I. R. R. and all the real estate on Delaware street between Mechanic and Pearl streets; also the crossings of streets and alleys within the aforesaid limits. And it is ordered that the expense of constructing said sewer be assessed upon the owners of the real estate included within the foregoing limits, in proportion to the number of lineal feet owned by them respectively upon said streets, and that

the same be a lien upon said real estate, in the same manner and to the same extent, and be collected in the manner, and according to the forms that assessments for street improvements are assessed and collected, according to the provisions of the city charter. The city of Columbus shall pay for crossing of streets within said limits, in proportion to the width thereof.

"Sec. 3. The city engineer will immediately set stakes indicating the course, depth, and fall of said sewer, and will immediately advertise by handbills, posted in conspicuous places of said city, for at least five days, for sealed proposals for the construction of said sewer, including all necessary excavations, the furnishing of the material, the buying of the same, and the removal of all earth and rubbish not used in the construction thereof; the work to be completed on or before the first day of September, and the council reserving the right to reject any and all bids."

And on the 10th day of August, 1869, the city council adopted the following additional ordinance: "An ordinance to provide for the extension of the sewer on Harrison street.

"Sec. 1. Be it ordained by the common council of city of Columbus; that the sewer heretofore ordered to be constructed on Harrison street in said city by an ordinance adopted July 19th, 1869, shall be extended from the east side of Franklin street to the western terminus of said street, and shall be constructed of unglazed horse-shoe tiling, nine inches in inside diameter, the same to be laid to the depth, and with the fall established or prescribed in the ordinance above referred to. The joints to be laid in cement, with clay thrown around the tiling and well rammed. The earth from the ditch to be replaced or removed.

The civil engineer is directed to advertise forthwith for sealed proposals for furnishing materials for said sewer, and also for constructing the same, including the excavation, laying the tiling, and removal of surplus earth; bids for material and construction, to be made separately. Such advertising

shall be for ten days, the bids to be reported to the council at the next meeting thereof.

"All ordinances heretofore adopted in relation to said sewer are hereby repealed, in so far as they conflict with this ordinance, but the same are continued in force as to the manner of assessing and collecting the expense of construction of said sewer, and such provisions are made applicable to this ordinance."

After the sewer was completed, the civil engineer of the city made a report to the council, in which he apportioned the expenses of the work among the owners of the lots in the district or on the streets designated in the ordinance of July 19th, 1869, charging against each piece of property the same amount per front foot, so much in favor of the party who furnished the material, and so much in favor of the person who did the work. This statement was adopted by the council as a first and final estimate in favor of each of said parties, and the property owners were required to pay the sums set opposite to their names, being the amount so reported by the engineer.

Several objections are urged against the validity of these proceedings of the city council and its officers.

Under the original act for the incorporation of cities, sewers were constructed and paid for under the same rules as streets, &c. Why the law was changed from what it was to what it is, we do not know. In *The Board of Commissioners of Allen County* v. *Silvers*, 22 Ind. 491, the subject was considered with reference to the original law of 1852, but little or no aid can be derived from that adjudication in any question arising under the present law.

We do not think it necessary to go into an examination of all the questions argued in this case. A single, well founded objection to the proceeding will be fatal to the right of the contractors to recover, and will justify the judgment of the common pleas, in granting the restraining order or injunction.

It will be observed that the ordinance of July 19th, 1869,

fixes the character of the improvement, and provides that it shall be "constructed on Harrison street in said city, from the alley between Washington and Franklin streets to the west side of the Jeffersonville, Madison, and Indianapolis Railroad, near the western terminus of said Harrison street;" and it also provides what real estate will be "drained and benefited by said sewer."

But by the ordinance of August 10th, 1869, the character of the drain is changed, and, which is still more material, it is provided that the drain "shall be extended from the east side of Franklin street to the western terminus of said Harrison street."

While the character of the work is changed by the last ordinance, and its length is also changed, no change is made in the taxing district.

Conceding that everything else which was done was correctly done, it seems to us that this is a fatal objection to the proceeding. If the city council had the power to say what property would be benefited by the construction of the sewer which was provided for in the first ordinance, they certainly had not the right to construct a work of a different character, and extending over other portions of the street, and still charge its cost upon the same property that would have been benefited by the construction of the sewer first described. And it is not material, it strikes us, whether the sewer constructed was longer or shorter than that for which the benefits were estimated. If it was longer, then probably other property beside that included as benefited by the sewer as first provided for should have been included as benefited. And if it was shorter, then we may infer that some of the property charged with the expense of constructing the same should not have been included.

The judgment of the common pleas is affirmed, with costs.*

F. Winter, for appellants.

R. Hill, G. W. Richardson, and *S. Stansifer*, for appellees.

* Petition for a rehearing overruled.

STONEMAN v. PYLE.

PROMISSORY NOTE.—*Commercial Paper.*—If a note is payable at a bank in this State, a stipulation therein for the payment of attorney's fees should suit be instituted thereon will not destroy the commercial character of the paper.

EVIDENCE.—In a suit upon a note governed by the law merchant, negotiated before due, where the defense is that it was procured by fraud, and that the plaintiff purchased with a knowledge of the facts, the plaintiff may be asked by his attorney when testifiying as a witness in his own behalf, whether or not, at the time of the purchase of the note, or prior thereto, he had any notice or knowledge of any fraud in the obtaining of the note, or that a patent right for which it was given was invalid or valueless.

APPEAL from the Marion Common Pleas.

WORDEN, J.—This was an action by the appellant against the appellee upon a promissory note executed by the defendant, Pyle, to the order of one S. B. Hartman, and by the latter indorsed to the plaintiff, for the sum of fifteen hundred dollars, dated January 1st, 1867, and payable six months after date, at the Citizens' National Bank of Indianapolis.

The note contained a stipulation for the payment of attorney's fees should suit be instituted thereon.

The defendant answered, first, by the general denial; second, that the note was given for a certain patent right, which was valueless, and was obtained by means of certain false and fraudulent representations as to the patent right, setting out the circumstances, and averring that the plaintiff purchased the note with a full knowledge of the facts thus alleged. Reply in denial.

Trial by jury, verdict and judgment for defendant. Motion for new trial overruled, and exception.

The fraud charged, and the worthlessness of the patent right, may be regarded as clearly enough established, so that if the plaintiff is to be considered as standing precisely in the shoes of the payee, Hartman, the verdict and judgment seem to be right.

But as the note was payable at a bank in this State, it is governed by the law merchant, and the holder thereof is en-

titled to all the rights of a holder of commercial paper, unless the clause in the note stipulating for the payment of attorney's fees, in case suit should be commenced thereon, takes it out of that class of paper. It is earnestly urged by counsel for the appellee, that the provision above indicated makes the amount of the note uncertain, and therefore that it does not come within the legal requirements of commercial paper. It may be conceded that a note, in order to be placed upon the footing of bills of exchange, must be for a sum certain; for in no other way can the maker know precisely what he is bound to pay, or the holder what he is entitled to demand. But the note in question, if paid at maturity, or after maturity, but before suit brought thereon, is for a sum certain. On the maturity of the note, the maker knew precisely what he was bound to pay, and the holder what he was entitled to demand. In the commercial world, commercial paper is expected to be paid promptly at maturity. The stipulation for the payment of attorney's fees could have no force except upon a violation of his contract by the defendant. Had the defendant kept his contract and paid the note at maturity, or afterwards, but before suit, he would have been required to pay no attorney's fees, nor would there have been any difficulty as to the extent of his obligation.

We see no reason, on principle or authority, or on grounds of public policy, for holding that such a stipulation destroys the commercial character of paper otherwise having that character. See *Smith* v. *Silvers*, 32 Ind. 321. The case is quite analogous to a class of cases on the subject of usury. Says Mr. PARSONS, "So if the borrower agrees to pay the sum borrowed at a time certain, or on demand, with lawful interest, and if he fail to do so, so much more by way of penalty, even if it be called extra interest, this is not such usury as would affect the contract, because the borrower has the right to pay the principal and avoid the penalty." 2 Parsons Notes and Bills, 413, 414. So here the defendant had the right to pay the face of the note when due and avoid the attorney's fees. As long as the note retained

the peculiar characteristics of commercial paper, viz., up to the time of its maturity and dishonor, the amount to be paid on the one hand, and recovered on the other, was fixed and definite.

The note being governed by the law merchant, it remains to inquire what rights the plaintiff has in reference to it, under the facts of the case. He purchased it on the 10th of January, 1867, only ten days after its execution, and long before its maturity, for a valuable consideration, viz., the sum of thirteen hundred dollars in cash; and it is quite clear, under these facts, that unless he had notice of the facts involved in the defense at the time of his purchase, he is entitled to recover.

We have examined the evidence in the cause with some degree of care, and find nothing in it that justifies a verdict against the appellant upon this point. There was not only no evidence that brought knowledge home to the plaintiff at the time of his purchase, but the defendant testified that he did not himself discover that he was swindled until he went to Pennsylvania to make inquiry concerning the patent right, which was about five months after the execution of the note.

On the trial of the cause, the plaintiff was examined as a witness, and was asked by his counsel to state whether or not at the time, or prior to the purchase of the note, he had any notice or knowledge of any fraud in the obtaining of the note, or that the patent right for which it was given was invalid or valuless. An objection made by the defendant to this question was sustained by the court, and the plaintiff excepted. In this we are of opinion that the court erred. We see no substantial objection to the form of the question, and we think it was competent for the plaintiff to testify to his knowledge or want of knowledge on that subject.

The appellant makes some other minor questions in the cause, which it is unnecessary to consider, as the judgment will have to be reversed, for the reasons above stated.

The judgment below is reversed, with costs, and the cause remanded for a new trial.*

T. A. Hendricks, O. B. Hord, and *A. W. Hendricks,* for appellant.

J. W. Gordon and *W. March,* for appellee.

*Petition for a rehearing overruled.

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KELLEY *v.* LOVE, Executor.

PLEADING.—*Complaint by Executor.*—A complaint by an executor need not allege the death of the testator, or show an appointment of executor. It is sufficient if it appear from the statements of the complaint that the plaintiff sues in his representative capacity.

SAME.—*Capacity of Executor to Sue.*—The question of the capacity of an executor to sue can only be raised by a sworn answer.

ASSIGNMENT OF JUDGMENT.—To pass the legal title to a judgment, the assignment must be made in the manner pointed out by statute.

SAME.—*Equitable Title.*—An assignment not on the record of the judgment will pass the equitable title to a judgment and enable the assignee to sue thereon.

PRACTICE.—*Defect of Parties.*—A demurrer upon the ground of defect of parties must specifically point out the defect and designate the proper parties.

APPEAL from the Greene Common Pleas.

DOWNEY, C. J.—The appellee, as executor of the will of Oliver H. Smith, deceased, sued the appellant on a judgment rendered in the Greene Circuit Court in favor of the Evansville, Indianapolis, and Cleveland Straight Line Railroad Company, against the appellant, and which it is alleged had been assigned by the plaintiff therein to the deceased. A copy of the judgment and also of the assignment are made part of the complaint and filed therewith. In the title of the case, the plaintiff styles himself as "executor of Oliver H. Smith's estate," and in the body of the complaint as "executor of the last will of Oliver H. Smith." It is not anywhere alleged in the compliant that Oliver H. Smith is dead, or that the plaintiff had been appointed executor of his will. The assignment of the judgment filed with the

complaint is as follows: "For value received I assign this judgment to O. H. Smith, Nov. 5th, 1858.

Attest, Ev., Ind. & Cleveland S. L. R. R. Co.
J. M. HUMPHREY, Clerk. per W. MACK."

A demurrer to the complaint was filed, on the ground that, first, it did not state facts sufficient to constitute a cause of action; second, that the plaintiff had not legal capacity to sue; third, that there was a defect of parties plaintiffs. This demurrer was overruled, and the point reserved by exception. The defendant failing to answer over, final judgment was rendered against him.

The only error assigned here is the overruling the demurrer. The first point made is, that the complaint does not allege the death of Smith, and that Love had been appointed the executor of his will. We think these facts sufficiently appear. It is true that they might have been, and perhaps, generally are, alleged in a more direct manner than in this case. Profert of the letters testamentary need not be made, nor can the right of the executor to sue be questioned, unless by a sworn answer. 2 G. & H. 527, sec. 152.

The second point urged is, that the assignment of the judgment, a copy of which is filed with the complaint, is not sufficient, because it is not shown to have been made by an authorized person, nor is it shown to have been made on the record of the judgment, as required by 2 G. & H. 366. It is alleged in the body of the complaint that the judgment was assigned by the plaintiff therein to Smith. This is equivalent to an allegation that the assignment was made by a duly authorized agent.

To pass the legal ownership of the judgment, it is necessary to conform to the statute in making the assignment, but not to pass the equitable title. *Burson* v. *Blair*, 12 Ind. 371. The assignment in this case, if not on the record of the judgment, was still sufficient to make the plaintiff's testator the equitable owner of the judgment, and therefore the real party in interest, and the executor of his will could sue on it in his own name. It is probable that the railroad company

should have been made a defendant in the case; but if so, the demurrer does not raise that question. It simply alleges a defect of parties plaintiffs, and does not point out who the omitted party is, and was therefore insufficient to raise the question discussed.

The judgment is affirmed, with five per cent. damages and costs.

BUSKIRK, J., having been of counsel, was absent.

S. H. Buskirk, *J. R. Isenhower*, and — — *Baker* for appellant.

THE JEFFERSONVILLE, MADISON, AND INDIANAPOLIS RAILROAD CO. *v.* ROSS and Another.

PRACTICE.—*Bill of Exceptions.*—Where there is an appearance to an action, the summons and return are no part of the record unless made so by a bill of exceptions.

SAME.—*Summons and Return.*—Where there is no appearance to an action, the summons and return are properly a part of the record.

APPEAL from the Clark Common Pleas.

DOWNEY, C. J.—This action was brought by the appellees against the appellant, to recover the value of mules killed or injured by the locomotive and cars on the road of the defendant, at a point where the road might have been, but was not, fenced.

There was a trial by the court, finding for the plaintiff, motion for a new trial, because the finding was not sustained by the evidence and was contrary to law, overruled, and judgment for the amount of the finding.

Two errors are assigned; first, the refusal of the court to quash the summons and set aside the return thereof; and, second, the refusal to grant a new trial.

The summons, return, and motion, are copied into the transcript by the clerk, but this is unauthorized, and therefore presents no question to us. There having been an appearance, the summons and return are no part of the record, unless made so by bill of exceptions. 2 G. & H. 273, sec. 559; *Taylor* v. *Fletcher*, 15 Ind. 80. But where there has been no appearance, the summons and return are properly a part of the record, without a bill of exceptions. *Stanton* v. *Woodcock*, 19 Ind. 273.

We have read the evidence, and have not discovered any insufficiency in it to sustain the finding, and no brief is filed by the appellant calling our attention to any such defect.

The judgment is affirmed, with costs, and ten per cent. damages.

G. V. Howk and *C. D. Howk*, for appellant.

J. G. Howard and *J. F. Read*, for appellees.

Ex Parte Colter.

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Criminal Law.—*Murder in Second Degree not Bailable.*—Where the proof is evident, or the presumption strong, murder in the second degree is not a bailable offense.

APPEAL from the Hon. Scott Carter, Judge of the Fifth District, sitting in Franklin Circuit Court.

Downey, C. J.—Colter was indicted for murder in the second degree, and having been arrested, made application by *habeas corpus* to be let to bail. After a hearing, the judge refused to let him give bail, and remanded him to prison. From that decision he appeals.

It is insisted that murder in the second degree is always a bailable crime. The constitution provides, that "offenses, other than murder or treason, shall be bailable by sufficient

sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong." Art. 1, sec. 17. It is supposed that the word "murder" used in this section must be understood as at common law, where there were but two degrees of felonious homicide, murder and manslaughter.

The provision in the constitution of 1816, on this subject, was as follows: "That all persons shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident, or the presumption great," etc. Art. 1, sec. 14.

The division of murder into two degrees was first made in this State in the statute of 1843, which had been in force for some six or seven years at the time of the formation of our present constitution. While the convention which formed that instrument was making the change, which we have seen was made in the language of the section in question, it must be presumed, we think, that they meant to adapt it to the definition of murder as it then existed in the statute, and consequently intended to embrace, by the term murder, both degrees of that crime. It follows that in cases of murder in the second degree, where the proof is evident or the presumption strong, the offense is not bailable.

The evidence on which the judge acted in refusing bail is set out in a bill of exceptions. We have examined it, and are not inclined to disturb the action of the judge below in refusing to let the prisoner to bail, and remanding him to custody.

The judgment is affirmed, with costs.

B. F. Claypool, *J. M. Wilson*, *W. Morrow*, *N. Trusler*, and *H. Berry*, for appellant.

B. W. Hanna Attorney General, for the State.

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HOWARD and Another v. SHOEMAKER, Auditor of State, and Another.

OFFICE AND OFFICER.—*Judicial Office.—Mayor.—Prison Director.*—It seems that the office of mayor of a city incorporated under the general law of 1867 for the incorporation of cities is a judicial office, and that, therefore, the incumbent thereof is ineligible to the office of prison director during the term for which he was elected mayor.

SAME.—*Lucrative Offices.*—The offices of mayor of a city incorporated under said general law and of director of the state prison are both lucrative offices, and the election of one who is such director to the office of mayor and his acceptance thereof will vacate his office of director.

APPEAL from the Marion Civil Circuit Court.

DOWNEY, C. J.—In May, 1869, Levi Sparks was elected to the office of mayor of the city of Jeffersonville, a city incorporated under the general law of the State with reference to the incorpation of cities, for two years, and took upon himself the discharge of the duties of the office. At the same time, in pursuance of an order of the city council, a city judge was elected for the same term, who took upon himself the duties of that office. On the 11th day of January, 1871, before the expiration of the two years for which Sparks had been elected mayor, he was elected by the legislature a director of the southern prison, and having qualified, entered on the discharge of the duties of that office.

In May, 1871, Sparks was re-elected mayor of the city of Jeffersonville, and at the same time a city judge was again elected, each for two years; and each qualified and took upon himself the discharge of the duties of his office, in which he is still serving.

On the 22d day of May, 1871, Heiskel was appointed by the Governor to the office of director of the prison, on the theory that Sparks was not a legal director. He qualified, and claims to be entitled to act as such director. On the 23d day of May, 1871, Sparks and Kirk, a director of the prison, made an order removing Shuler from the office of Warden, to which he had been elected for four years from the 1st day

of January, 1869, and appointed Keigwin warden in his place.

The appellants, having a claim for supplies furnished to the prison, procured the same to be allowed by Sparks and Kirk, who gave them an order on the State for the amount, the order being signed by Keigwin, as warden. This order was presented to Shoemaker, the auditor of State, who refused to allow it or draw his warrant on the treasurer therefor.

This proceeding, by way of mandate, was commenced against Shoemaker, to compel him to audit and allow the claim and draw his warrant therefor on the treasurer of state. Hieskel and Curry, directors, and Shuler, the warden, were made parties to the suit on their own application. In the circuit court there was judgment for the defendants, and the plaintiffs appealed to this court.

The only question in the case is whether or not Sparks is legally a director of the prison. All the parties waived every other question, and desire a decision of this one.

Two points are discussed, involving this main question: First, was Sparks, as mayor of Jeffersonville, a judicial officer when he was elected director, in January, 1871? and second, did his election to the office of mayor in May, 1871, and his acceptance of that office have the effect to vacate the office of director of the prison?

The duties of Mayor of a city, under the act of 1867, are declared as follows:

"Sec. 17. It shall be the duty of the mayor to see that the laws of the State and the by-laws and ordinances of the common council be faithfully executed within such city; he shall be a conservator of the peace, and, as such, shall have, within the city limits, the power conferred upon justices of the peace for that purpose; to exercise supervision over subordinate officers, and to recommend to the common council such measures as he deems for the public good; he shall sign all commissions, licenses, and permits granted by the common council, and he shall perform such other duties as the

nature of his office and the interests of the city require; he shall have the custody of the corporate seal, and may take and certify, under the same, the proof and acknowledgment of deeds and other instruments in writing, which shall be good in any court in this State, without further authentication; he may also take and certify depositions and affidavits, and the same shall have a like force and effect as if taken by a justice of the peace; he shall hold a city court every day, Sunday excepted, at a place to be furnished by the common council. While sitting as such court, he shall have exclusive jurisdiction of all prosecutions for violation of the by-laws and ordinances of the city and township in which such city is situated; he shall have, within the limits of said city, the jurisdiction and powers of a justice of the peace in all matters, civil and criminal, arising under the laws in this State, and for crimes and misdemeanors his jurisdiction shall be co-extensive with the county in which such city is situated: Provided, that in trials before him, he shall have power to adjudge imprisonment as a part of his sentence, not exceeding thirty days, in the city or county prison. In all actions in the city judge or mayor's court, either party may have a trial by jury and a change of venue to a justice of the peace in such city, and an appeal to a court of competent jurisdiction, under the same restrictions and in the same manner as in a justice's court, except in cases where the mayor has exclusive jurisdiction, no change of venue shall be allowed. The same rules of pleading and practice shall be observed in the city judge or mayor's court that are in a justice's court. The mayor shall give bond, payable to the State of Indiana, in any penal sum not less than three thousand dollars, to be approved by the clerk of the circuit court, with freehold security, conditioned for the faithful performance of his duties as mayor, and all other duties herein required, and file the same with the clerk of the circuit court within the time directed by law for justices of the peace. All fines and penalties collected by him shall

be paid into the city treasury, within one month after the same shall have been received by him, in the kind of funds so received, except when otherwise directed by acts prescribing the duties and powers of justices of the peace, in which case he shall pay all fines and forfeitures collected by him for violation of the penal laws of the State, into the county treasury, in the same manner and under the same restrictions that justices of the peace are required to do."

It is provided in section eight as follows:

"Sec. 8. The officers of such city shall consist of a mayor, two councilmen from each ward, a city clerk, assessor, treasurer, civil engineer, street commissioner, and marshall, and if the common council deem it expedient for the best interests of the city, a city attorney and city judge."

In the sections of the act subsequent to these the mayor and city judge are spoken of, generally, in the same connection, coupled disjunctively, thus: "in all actions in the city judge or mayor's court either party may have a trial by jury," &c.; "the same rules of pleading and practice shall be observed in the city judge or mayor's court that are in a justice's court;" "the mayor or city judge shall keep a docket," &c.; and "in the absence of such mayor or city judge, the docket shall be deposited with any justice of the peace in the city, who shall be vested with all the judicial powers and authority of such mayor or city judge." In case of the death of the mayor or city judge, the docket shall be placed in the hands of some justice of the peace of the city, "who shall act as and have all the judicial power and authority of such mayor or city judge," until the vacancy shall have been filled. It is made the duty of the person having the charge of the county prison, under certain circumstances, to obey the judgment of the "city judge or mayor's court." The same fees are allowed in the city judge as in the mayor's court, to the city attorney. But no part of the act expressly confers upon the city judge any jurisdiction whatever. The following passage, found in the section relating to the duties of mayor, in the act of 1857, is wholly omitted in the act of

1867: "If the common council shall deem it expedient for the interests of such city to cause a city judge to be elected, the same may be done at any general election at which the mayor shall also be elected, and such city judge shall give the like bond as the mayor is herein required to give, and he shall, from and after his due qualification, perform all the judicial duties herein required to be performed by the mayor."

Under this provision in the act of 1857, it is quite clear that when the city council had ordered the election of a city judge, and he had been elected and had qualified, from that time the mayor was relieved of his judicial duties. In the absence of any provision in the act of 1867, taking away from the mayor the judicial duties so clearly and expressly conferred upon him by section seventeen above quoted, without deciding whether the city judge has or has not any jurisdiction, two of the members of this court are of the opinion that under the act of 1867, the mayor of a city is a judicial officer within the meaning and intent of sec. 16, art. 7, of the constitution of the State, and that, therefore, Sparks was ineligible to the office of director of the prison during the term for which he was elected mayor in 1869, and consequently ineligible when he was elected by the legislature in January, 1871. Upon the other question, it is the opinion of a majority of the court that as the mayor of a city, under the act of 1867, has duties to perform, under the laws of the State, aside from those which are judicial and those of a purely municipal character, such as the taking and certifying of affidavits and depositions, the proof and acknowledgment of deeds and other instruments in writing, for which he is entitled to and may charge and receive fees, the office is a "lucrative" one, within the meaning of sec. 9, art. 2, of the constitution of the State, that the office of director of the prison is also lucrative, and that the election of Sparks to the office of mayor in May, 1871, and his acceptance thereof vacated the office of director of the prison, if he was eligible thereto when he was elected. *Dailey* v. *The State, ex rel. Huffer*, 8 Blackf. 329; *Creighton* v. *Piper*, 14 Ind. 182.

The judgment is affirmed, with costs.

J. E. McDonald, J. M. Butler, E. M. McDonald, J. H. Stotsenburg, and *T. M. Brown,* for appellants.

J. W. Nichol, L. Jordan, C. A. Ray, and *S. E. Perkins,* for appellees.

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McCray and Others *v.* Lipp and Others.

Will.—*Rule in Shelley's Case.*—A. made his will, as follows: "And it is my will that my son John shall have that land as follows: the south-west quarter of section twenty-two, in town twenty-two, north of range one west, to be for his use his life, and then to fall to his heirs."

Held. that this gave to the devisee the fee simple, according to the rule in Shelley's case.

Same.—*Evidence.*—Where the law fixes the intention of the testator from the terms of a will, parol evidence of the condition, character, and habits of the devisee as well as declarations made by the testator at the time of making the will, in order to show that the testator only intended to give the devisee a life estate, are inadmissible.

APPEAL from the Clinton Circuit Court.

Downey, C. J.—Suit by the appellants against the appellees to recover the possession of certain real estate. There was a trial by the court, and a finding and judgment for the defendants. The plaintiffs claimed as the heirs of John McCray, Sen., while the defendants claimed as the grantees of John McCray, Jr. The title of John McCray, Jr., depended on the will of his father, which is as follows:

"In the name of God, Amen.

"I, John McCray, of Clinton county, and State of Indiana, being sound in memory and understanding, thanks be to Almighty God for the same, being mindful of my mutability, do make and constitute this my last will and testament.

"First and principally, I commend my spirit to God that gave it, in hopes of a joyful resurrection, and body to the

earth, when it shall please God to separate my soul and body, to be buried decently. And as to such worldly estate which it hath pleased Almighty God to bless me with, I give and dispose as follows:

"(Items.) It is my will, I do order and direct that all my debts and funeral expenses be paid. I do order, and nominate, and appoint my friends, William Douglass and John Douglass, both of Clinton county, to be my executors of this, my last will and testament.

"It is my will that my son James shall have sixty dollars out of my estate. It is my will that my son Samuel, I allow him eighty dollars, to be paid out of my estate. And it is my will that my three daughters, Elinor, Martha, and Mary, to have one hundred dollars each, to be paid out of my estate; and it is my will that my son John shall have that land as follows: the south-west quarter of section twenty-two, in town twenty-two, north of range one west, to be for his use his life, and then to fall to his heirs. And it is my will that my son William shall have all that lot in the prairie, being the west half of the south-east quarter of section eight, in town twenty-one north of range one west, and the west half of the south-east quarter of section twenty-nine, and the east half of the south-west quarter of the south-west quarter of section twenty-nine, in township twenty-two, north of range one west, being the place on which Irwin lives. And further, it is my will that my son William shall keep his mother her lifetime, but give her the choice to live with him or any of his brothers or sisters when she please. And further, it is my will that all the money that shall be on hands after all the debts and legatees be paid, William shall have, to keep his mother, and the use of the family while they live together. And further, it is my will that the children all live together and work together until the(y) take (break) up housekeeping themselves. And it is my will that the wagon, gears, and horses shall belong jointly to my sons John and William, for the use of the place and family. Again, it is my will that if the money due me in Virginia

cannot be collected, or any part of the same, all the legatees shall lose a part, according to their portions. And further, I allow the carriage to be sold for the benefit of the family. I publish this, and no other, to be my last will and testament."

If John McCray, Jr., took the fee under the will, then the defendants, as his grantees, were the owners of the land, but if he took only a life estate, the plaintiffs, as the heirs of John McCray, Sen., are the owners. A majority of the court are of the opinion that that part of the will which says, "And it is my will that my son John shall have that land as follows: the south-west quarter of section twenty-two, in town twenty-two, north of range one west, to be for his use his life, and then to fall to his heirs," gave to John the fee simple, according to the rule in Shelley's case.

Parol evidence was offered to show the condition, character, and habits of John, with a view of raising an inference that his father did not intend to entrust him with the fee simple; and also it was proposed to prove the declaration of the father, at the time of making the will, that he only intended to give John a life estate. We all agree that the latter evidence was properly excluded; and a majority of us agree that the other evidence was also properly excluded. We think that the law fixes the intention of the testator, and that, in a case like this, parol evidence cannot be admitted to show any other intention. The father having given a life estate to John, and having limited the remainder to his heirs, by the same conveyance, John took the fee.

Under the rule in Shelley's case, the fee passes in opposition to the apparent intention of the testator. See *Siceloff* v. *Redman's Adm'r*, 26 Ind. 251, and the cases there cited. It could not be useful to allow the introduction of parol evidence, with the view of ascertaining the intention of the testator, when that intention cannot, under the rules of law, be made effective, when it is ascertained.

The judgment is affirmed, with costs.

PETTIT, J., (dissenting)—This suit was brought by the

appellants against the appellees, to recover possession of real estate.

The testator died, and John, named in the will, sold the land, the use of which was given him for his life, and made a deed for it in fee simple, and died without issue; and the appellants, his brothers and sisters, and the descendants of his deceased brothers and sisters, brought this suit against the purchasers of the lands from John, claiming that John took by the will only a life estate. The questions for consideration are the construction of the will, and the refusal of the court to allow certain parol evidence to show the condition of the testator's family, and his declarations of his intentions and purposes at the time of the execution of the will.

What interest or estate did John take in the land by virtue of the will? Was it a life estate only? or was it a fee simple? The first and fundamental rule to be observed in the construction of a will, is to ascertain, if possible, and carry into effect, the intention of the testator, if such intention be not forbidden by some law of the land, such as the creation of a perpetuity against law, or devising lands to one who is prohibited from holding real estate, as an alien. 2 Bl. Com. 500; 4 Kent Com. 534–5; Redfield on Wills, 432; *Lutz* v. *Lutz* 2 Blackf. 72; *Baker* v. *Riley*, 16 Ind. 479; and *King* v. *Beck* 15 Ohio, 559.

A man is prohibited from violating the law of the land by his will, as fully as by his deed; but he is at liberty to dispose of his property as he pleases, if in so doing he violates no law. If, then, the testator gave John the "use" of the land for his life, and after his death gave it to his heirs, he made a legal disposition of it, and such an one as was forbidden or prohibited by no law or public policy of the State. I think I cannot be mistaken in saying that it is the clearly expressed will of the testator that John should take no more than the "use" of the land for his life, and that at his death the fee simple should go, or to use his own words, "fall to his heirs." Indeed, a later clause in the will even limits this exclusive right of "use" to John during his life: "And

further, it is my will that the children all live together, and work together, until they break up housekeeping themselves. And it is my will that the wagon, gears, and horses shall belong jointly to my sons John and William, for the *use* of the place and family." It is evident that this was his home place, where he and his children then lived; for this and the land he gives to his son William (which he describes as "the place on which Irwin lives") were all the lands he had to dispose of. All the children then in the family were to share the *use* and occupancy of the farm, stock, &c., with John, as long as *they*, not *he*, should elect. They all had a right jointly with him to its use as long as they chose, but when they should "break up housekeeping," the place was to be for John's exclusive use during his life, and at his death to "fall to his heirs."

The word "use" is twice used in this will; once in relation to the real estate, and once in reference to the personal property, and in both instances in the ordinary or literal sense, that of the usufruct of the thing designated.

The appellants (plaintiffs below) offered to prove by parol evidence the condition and circumstances of the family of the testator at the time of making his will; that John was unmarried, of very intemperate and reckless habits; and that these facts were known to the testator at the time of making the will, as tending to show his purpose; but the court refused it. This was error. Had it been necessary to aid the court to interpret the will, it should have been allowed. *Stevenson* v. *Druley*, 4 Ind. 519; 1 Greenl. Ev., secs. 286, 289. The parol evidence offered, to prove what the testator said at the time of the execution of the will, was properly rejected by the court. This rule is so well settled that it is not necessary to cite authorties.

It is contended that this case comes within the rule in Shelley's case. I think not. That rule is not inflexible when applied to devises. It yields to the manifest intention of the testator. *Doe* v. *Jackman*, 5 Ind. 283; *Siceloff* v. *Redman's Adm'r*, 26 Ind. 251.

That is not a rule of construction, but of property, which had its origin in feudal tenure, and was first adopted to secure to the lords the profits, rights, and perquisites incident to inheritances. It is at best a mere artificial technicality, the maintenance of which is to displace the clear intention of the testator and produce injustice, when justice ought to prevail. It has met with denunciation and severe criticism from the ablest judicial minds in England and this country, till it has become the practice of courts whenever the question arises, to hold that the particular case then under consideration does not come within the rule in Shelley's case. It has been abrogated by many of the states, and greatly modified in England by 3 and 4 William 4. *Siccloff* v. *Redman's Adm'r, supra.* It is the high and stern duty of this court to conform its judicial action, when we attempt to walk by the light of precedent from another country, to the nature of our government and institutions.

The intention, if not unlawful, must be followed. How can his "will that the children all live together on this land until they break up housekeeping themselves," be reconciled with the hypothesis that John could, immediately after their father's death, sell the farm, and cast the other children from the home their father had willed to them jointly with John? The children had well defined rights there, not depending on the will or caprice of John, but derived from the same source and co-equal with his, as long as they chose to exercise those rights. He could not arbitrarily determine these rights by a sale of the fee simple.

I think the judgment ought to be reversed.

J. N. Sims, for appellants.

L. McClurg, for appellees.

JONES v. THE STATE.

CRIMINAL LAW.—*Indictment.—Murder.*—It is unnecessary under the code to allege in an indictment for murder the part of the person on which the wound was inflicted.

APPEAL from the Fountain Circuit Court.

DOWNEY, C. J.—The indictment in this case charges that the appellant, on the eleventh day of October, 1870, at said county and State, did then and there, feloniously, purposely, and with premeditated malice, unlawfully kill and murder one James Hall, by then and there feloniously, purposely and with premeditated malice, shooting at, against, and mortally wounding said James Hall, with a certain gun, then and there loaded and charged with gunpowder and leaden shot, which said gun he, the said John W. Jones, then and there had and held in his hands, contrary to the form of the statute, &c.

There was a motion to quash the indictment, made by the defendant, which was overruled, and an exception entered. After an arraignment and plea of not guilty, the defendant was tried by jury, and found guilty of murder in the second degree, and that he be imprisoned in the state prison for life. A motion for a new trial was made, for the reasons that the verdict was contrary to law, was not sustained by sufficient evidence, because, the court overruled the motion to quash the indictment (?), and because the court erred in giving on its own motion instructions numbered 7, 8, 9, 11, 14, and 17.

This motion was overruled, and the defendant was sentenced according to the terms of the verdict.

The defendant assigns two errors; first, the refusal to quash the indictment; and second, the refusal to grant a new trial.

The objection to the indictment is, that it does not aver upon what part of the body of the deceased the mortal wound was inflicted.

At common law, an indictment thus defective could not be sustained. *Dias* v. *The State*, 7 Blackf. 20. But while this

is true, it was held that the proof need not correspond with the allegation. *Ibid.* A wound on the head might be alleged, and one on the body be proved, or *vice versa*, without any variance. But to allege a blow on one side of the head producing a wound on the opposite side was, as decided in that case, a fatal repugnancy. It was also held in the same case, and in *Dillon* v. *The State*, 9 Ind. 408, and in *Dukes* v, *The State*, 11 Ind. 557, that the depth and breadth of the wound need not be alleged. It is declared in the criminal code that the forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed in that code. 2 G. & H. 400, sec. 52. In *Dillon* v. *The State, supra*, STUART, J., in delivering the opinion of the court, said: "In a word, the legislature has laid down certain general rules in relation to the material facts of an indictment, and left the courts to apply these rules, and mold the forms by judicial decisions." In performing our part of this duty, so far as this case is concerned, we hold that it is unnecessary under the code to allege in an indictment for murder the part of the person on which the wound was inflicted. The particulars with reference to the wound, and also the part of the person on which it was inflicted, are proper matters of evidence under the more general allegations of the indictment. The court committed no error in overruling the motion to quash the indictment.

The general facts of the case are, that both the defendant and the deceased were intoxicated on the evening of the October election, in 1870. They went into a saloon about dark, apparently in a good humor with each other. Soon afterwards a difficulty arose, and the deceased pushed the defendant down one or more times, and kicked, or kicked at him; at which he became angry, and went away, making threats against the deceased. In about half an hour he returned with a gun, and from outside the door, shot the deceased, who was yet in the saloon, and who died from the effect of the wound in about five minutes. The defendant's residence

from which he got the gun was about half a mile from the saloon. Evidence was given tending to show that, some years before, the defendant had received an injury to his head in a fall from a horse, that when intoxicated he would destroy his own property, and would attack his own friends, while other evidence tended to show that the injury from the fall was not lasting. There was some evidence tending to show him insane, while much of the evidence was the other way.

We have examined the instructions to which exceptions were taken. One of them, relating to murder in the first degree, had there been a conviction in that degree, might require a closer examination. But as the conviction was of murder in the second degree, it is evident that the defendant could not have been prejudiced by it. One or more of the instructions, it seems to us, was more favorable to the defendant than he could justly have demanded. There is nothing in the instructions, when considered in connection with the facts of the case, for which the judgment should be reversed.

There was little or no dispute as to the facts of the case relating to the killing with a deadly weapon, in the absence of any sufficient excuse or justification.

The judgment is affirmed, with costs.

R. C. Gregory, *R. P. DeHart*, and *M. M. Milford*, for appellant.

B. W. Hanna, Attorney General, for the State.

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PERKINS *v.* ROGERS.

CONSTITUTIONAL LAW.—*Power to Declare War.*—Congress alone has power to declare war; and the President of the United States has no power to declare war or conclude peace, except as empowered by Congress.

SAME.—*Existence of Peace or War.—How Ascertained.*— The existence

of war and the restoration of peace are to be determined by the political department of the government; and such determination is conclusive upon the judiciary.

SAME.—*Judicial Notice.*—The courts will take judicial notice of the existence of war or the restoration of peace, when proclaimed by the President.

WAR OF THE REBELLION.—*When it became a Civil War.*—The late insurrection of the Southern states did not become a civil war, and was not governed by the rules of war, until after the proclamation of President Lincoln, issued August 16th, 1861, pursuant to an Act of Congress of July 13th, 1861.

CIVIL WAR.—*Rules of.*—A civil war is governed by the same rules as a foreign war,

SAME.—*Effects upon Inhabitants of States in Revolt.*—The proclamation of August 16th, 1861, placed all the inhabitants of Louisiana in a state of insurrection, and they became the enemies of the United States, and all commercial intercourse between the citizens of that State and those of the loyal states during the continuance of the war was unlawful, except such as was specially permitted by the President.

CONTRACTS.—*Between Citizens of Belligerent Powers.*—All contracts made between the citizens of the rebellious states, on the one hand, and of the loyal states, on the other, during the war, and not licensed by the President, were void.

SAME.—*Made Prior to the War.*—Contracts made prior to the proclamation of August 16th, 1861, were valid; but during the war the debt and the remedy were suspended, and did not revive until the restoration of peace.

ENEMY.—*Right to Sue.*—During the existence of war an enemy cannot sue in any of the courts of the hostile belligerent power.

SAME.—*Status of Inhabitant of Louisiana during the War.*—An inhabitant of the State of Louisiana during the war of the rebellion was an enemy of all the inhabitants of the State of Indiana, and could not maintain an action against any citizen of this State, in any of the courts of the United States.

SAME.—*Judicial Notice.*—The courts will take judicial notice that all the inhabitants of the State of Louisiana were in insurrection, but they will not take judicial notice that any of such inhabitants maintained a loyal adherence to the United States, or that any part of said state was occupied by the military forces of the United States, or that any person had a license or permit from the President.

RULES OF WAR.—*Occupation of New Orleans.*—The legal effect of the occupation of the city of New Orleans was to permit commercial intercourse between the citizens of that city and such citizens of the United States as were licensed by the President under the Act of Congress of July 13th, 1861.

STATUTE OF LIMITATIONS.—*Between Citizens of Different Belligerent Powers.* The statute of limitations does not run, during the existence of war, between the citizens of different belligerent powers.

SAME.—*Restoration of Peace.*—Upon the restoration of peace, the statute of lim-

itations begins to run; for both the debt and remedy, which have been suspended during the war, revive.

SAME.—Although actual hostilities ceased in April, 1865, yet peace was not legally restored until the 20th of August, 1866, when the rebellion was declared completely suppressed, and peace restored, by the proclamation of President Johnson.

SAME.—*Period Excluded from Operation of Statute.*—In an action instituted by a citizen of Louisiana against a citizen of Indiana, the time that intervened between the 16th of August, 1861, and the 20th of August, 1866, is to be excluded, in determining whether the action is barred by the statute of limitations.

SAME.—*Pleading.—Demurrer.*—When a statute of limitations contains no exceptions, and it appears upon the face of the complaint that the action is barred, the bar can be taken advantage of by demurrer; but where there are exceptions, the statute must be pleaded by answer.

SAME.—*New Promise.*—A letter written during the existence of the war of the rebellion, by a citizen of Indiana to a citizen of Louisiana, cannot take a case out of the operation of the statute of limitations.

APPEAL from the Vermillion Circuit Court.

BUSKIRK, J.—John C. Rogers, as surviving partner of the firm of N. Overton & Co., brought this action in the court below, upon account, against the appellant. The complaint was in four paragraphs. The first was as follows:

"The plaintiff complains of the defendant, and says that he is the surviving partner of the late firm of N. Overton & Co., which firm was composed of the plaintiff, John C. Rogers, and Nathaniel Overton, who is now deceased. That the said firm have, for many years last past, been engaged in the business of commission merchants, in the city of New Orleans; that the defendant resides in Eugene, Vermillion county, Indiana, and has, for many years past, been engaged in the business of buying and shipping grain to the plaintiffs at New Orleans, to be by them sold on commisson on his account; that the said firm has made large advancements to the defendant by accepting and paying his drafts on account of shipments of corn made and to be made by the defendant to the said firm, amounting in the aggregate to six thousand, nine hundred and thirteen dollars, and twenty-seven cents, and which advancements exceeded the amount of all sales made

by said firm on account of defendant, in the sum of nineteen hundred and ten dollars and forty-six cents; that the plaintiff has duly rendered an account to the defendant, as such commission merchants, of all shipments of grain received, and of all sales made, on his account, and demanded the payment of the said balance, which he refused to pay; and the plaintiff demands judgment for three thousand dollars.

"Second. And the plaintiff further complains, and says that the defendant is indebted to him, as surviving partner of the firm of N. Overton & Co., in the sum of three thousand dollars, balance on account, for moneys paid and advanced by the said firm to defendant, the particulars of which are set forth in account filed herewith, leaving due and unpaid the sum of three thousand dollars, for which he demands judgment."

The third paragraph was for three thousand dollars money loaned.

The fourth was for money had and received. There was filed with the complaint an itemized statement of the dealings between the parties. The first item charged was 1st August, 1860, and the last was April 15th, 1861. The first item in the credits was September 22d, 1860, and the last item, except one for interest, was April 27th, 1861. The balance due was nineteen hundred and ten dollars, and forty-six cents. The action was commenced May 6th, 1868.

The appellant demurred to the first, second and fourth paragraphs of complaint. The demurrer was overruled, and an exception taken.

The appellant filed an answer in three paragraphs. The first was the general denial. The second and third were in these words:

"For second answer, the defendant says that the cause of action mentioned in plaintiff's complaint did not accrue within six years next before the commencement of this action."

"For answer third, the defendant says that the transactions alleged in plaintiff's complaint were made during the late rebellion, during which the parties hereto occupied a hostile relation as enemies, they being citizens and residents of different sections of the United States of America, to wit, the said firm of N. Overton & Co., at the time, resided in the city of New Orleans, and in the State of Louisiana, and the defendant, at the time, resided in the State of Indiana; that the inhabitants of the said sections of the United States were, at the time of the said transactions, at war with each other, and subject to all the rights and disabilities of alien enemies."

To this answer the plaintiff replied in five paragraphs, which read as follows:

"First. Comes the plaintiff; and replies to the second paragraph of defendant's answer, and says that the cause of action mentioned and set forth in plaintiff's complaint did accrue within six years next before the commencement of this suit. Second. And for further reply to the second paragraph of the defendant's answer, plaintiff says that the defendant, within six years next before the commencement of this suit, by writing signed by him (a copy of which is filed herewith and made a part of this reply), promised to pay the plaintiff the several demands mentioned and set forth in his said complaint. Third. And for further reply to said second paragraph of said defendant's answer, he says that at the time his said cause of action accrued, to wit, on the 17th day of April, 1861, the plaintiffs were actual residents of the State of Louisiana, and that the defendant was an actual resident of the State of Indiana, and that both of said parties have continued to reside in their respective states as aforesaid, until the present time, and that at the time the plaintiff's cause of action accrued as aforesaid, war existed, by reason of the late rebellion, between the United States and the State of Louisiana, which was continued until the 13th day of June, 1865. And so the plaintiff says that six years had not elapsed between the close of the war and the commencement of this suit. Fourth. And the plaintiff further replies to the second paragraph, and says that from

the date of the transaction between the plaintiff and the defendant mentioned and set forth in the complaint, to wit, on the —— day of ——, 1860, until the commencement of this suit, the plaintiffs were actual residents of the State of Louisiana, and the defendant was an actual resident of the State of Indiana; that from the 17th day of April, 1861, until the 13th day of June, 1865, civil war, by reason of the late rebellion, existed between the subjects and citizens of the State of Indiana, and the State of Louisiana; and so the the plaintiff says that the interval of time which elapsed from the time that the plaintiff's cause of action accrued, to the beginning of the war, and from the close of the war to the commencement of this suit, did not, together, amount to six years. Wherefore, he says that this cause of action did accrue with six years next from the beginning of this suit. Fifth, And the said plaintiff replies to the third paragraph of defendant's answer, and says that he denies each and every allegation in said paragraph." The exhibit referred to in the above reply reads as follows.

"July 20th, 1863, EUGENE, Indiana.

"MESSRS. N. OVERTON, & Co., New Orleans:

"*Dear Sir*,—I have often thought of you and the many pleasant times I have had in your city. I was pained to learn of the death of Mr. Overton. Now to the point in question. When this war broke out, I had a large lot of corn bought for you. Indeed, I kept shipping so long that according to account current I,—there is two shipments that I have no account of; as I was going to say, the corn I had after I could not ship I had to sacrifice at a ruinous price. At that time our whole country was aroused and thought of nothing but the war. I had been selling goods for many years, as well as practicing medicine—had thousands of dollars standing out due me. Half of those persons are in the army. Consequently, I had to fail, though I have paid the last debt but yours. Mr. Rogers, just keep quiet, the time is not far off, I hope, that our once prosperous country will

be united, and I hope on satisfactory terms. I have been sick for eight months, not able to do anything. My health is getting good again. I am able to attend to the duties of my profession at this time. You need have no fears about losing what I owe you, if I keep my health. I protested the draft you gave Mr. Peyton for two reasons: I had failed; and the other, I wanted to see to those shipments. You spoke in a letter I got of you, that you always took me to be a man of integrity. If I could see you and talk with you, I would satisfy you that it was circumstances which I had no control over, and not the lack of integrity, that such has been the case. I do not know when I will be able to meet it, but shall work hard. Give my very best respects to Mrs. Overton and family. Write soon.

I am, respectfully, your most obedient servant,

R. A. PERKINS."

The appellant demurred to the second, third and fourth paragraphs of the reply, which demurrer was overruled, and to which ruling the appellant excepted.

The cause was, by the agreement of the parties, submitted to the court for trial. There was a finding for the plaintiff in the sum of two thousand two hundred and nineteen dollars and fifty four cents. The appellant moved the court for a new trial, and assigned in support thereof five causes, as follows:

1st. That the finding and judgment of the court are not sustained by sufficient evidence. 2d. Error of the court in overruling the demurrer to the first, second, third and fourth paragraphs of the complaint, and the demurrers to the second, third, and fourth paragraphs of the replication. 3d. Error of the court in admitting as evidence the letter of the defendant, Robert A. Perkins, dated July 20th, 1863, to N. Overton & Co. 4th. Error of the court in not holding as void, and rejecting from the account of the plaintiff, all the transaction and items therein named on and after the 15th day of April, 1861. 5th. Error in assessing the amount of the money; that the sum is too high.

The court overruled the motion for a new trial, and the appellant excepted to such ruling. The evidence is in the record by a bill of exceptions.

The appellant has assigned a large number of errors, but they mainly relate to the action of the court in overruling the demurrers to the complaint and the reply, and to the admission in evidence of the letter of the appellant to the appellee. We shall not examine the errors assigned in detail or in the order of events. The errors complained of resolve themselves into two or three general propositions, the determination of which will be decisive of the questions involved in this case.

The appellant, in the third paragraph of his answer, alleges that when the account upon which this action is brought was created, the parties to this action were alien enemies, by reason of the existence of war between the United States and the state of Louisiana. He maintains in argument that all commercial intercourse between the citizens of the two belligerent powers was prohibited by international law, and was consequently illegal, and constitutes no valid consideration. The appellee maintains that all the dealings between the parties had taken place before the late rebellion had become a civil war, and that consequently commercial intercourse was lawful. The determination of these questions necessarily involves an inquiry into the nature and character of the late rebellion. The real questions are, was it a mere insurrection in the beginning? and if it was, when did it cease to be such? and when did it become a civil war?

The appellant also maintains that the cause of action sued on did not accrue within six years, and that as that fact appears affirmatively upon the face of the complaint, the question was properly raised on the demurrer to the complaint.

The appellee insists that the question was not properly raised on the demurrer to the complaint, because the court will judicially take notice of the fact that a state of war existed between the United States and the State of Louisana,

of which the plaintiff was an inhabitant and citizen, and that the court will not and cannot judicially take notice of the fact that the plaintiff resided at a place in the said State which maintained a loyal adhesion to the union and constitution, or was occupied and controlled by the forces of the United States; in other words, that the proclamation of the President of the United States having declared that the whole state of Louisiana was in a State of insurrection, the court will take judicial notice thereof; but that if the appellant relied on the fact that the plaintiff resided at a point in a state that was loyal to the union, and was occupied and controlled by the forces of the United States, it was his duty to allege and prove the facts necessary to bring the case within the bar of the statute. The appellant in the second paragraph of his answer pleaded that the cause of action mentioned in the complaint did not accrue within six years next before the commencement of this action.

The appellee, in the fourth paragraph of his reply, attempts to avoid the answer setting up the staute of limitations by alleging that the appellee was an inhabitant and citizen of the State of Louisiana, and that the appellant was an inhabitant and citizen of the State of Indiana; that war existed between the United States and the State of Louisiana; that the appellee and appellant were alien enemies; that by reason of the existence of civil war all commercial intercouse and the right to institute and prosecute actions in courts between alien enemies were prohibited and unlawful; that the war did not destroy, but suspended, the debt sued on, and that it was not revived until the full and complete restoration of peace; that although the statute of limitations had commenced running before the war, yet as soon as a state of war existed it suspended the operation of the statute; and that it remained suspended until the 13th day of June, 1865, when the President by proclamation declared that peace existed, and, excluing the time when the statute was so suspended, the action was brought within six years.

The appellee also attempts to avoid the statute of limita-

tions by alleging that the appellant, on the 20th day of July 1863, acknowleded in writing the existence and validity of the debt sued on.

The appellant attempts to answer the acknowledgment of the debt, by showing that when the letter was written containing such acknowledgment all commercial intercourse between the parties to this action was prohibited and unlawful, and that the acknowledgment, if made, was illegal and void. The appellant also insists that the acknowledgment relied upon was not valid, because "it is vague, equivocal, indeterminate, doubtful and conditional, leading to no certain and definite conclusions" and that "an acknowledgment that will take the case out of the statute must be without qualification and without conditions."

The appellant also attempts to answer the position of the appellee that the statute was suspended during the war, by assuming that when the forces of the United States occupied and controlled the city of New Orleans, where the plaintiff resided, the statute again commenced running.

The appellee maintains that the occupation of the city of New Orleans did not have the effect contended for, because the state of civil war existing between the State of Louisiana and the United States made all the citizens of such State alien enemies, and an alien enemy can not maintain an action in the courts of a state that was loyal to the government, and the authority of the United States did not extend beyond the actual territory occupied by the forces of the United States; that such occupation did not relieve the plaintiff of the disabilities upon him and other citizens of the state, and restore to him the right to institute and maintain an action in the courts of this State; that such occupation did not render commercial intercouse lawful, except in so far as the right to trade was given by special permit from the Secretary of Treasury; that under the proclamation of General Butler, the person and property of the plaintiff were entitled to protection, but this protection did not extend beyond the actual limits occupied by the forces of the United

States; that the statute of limitations, having been suspended by the war, it did not not commence to run until the entire state was restored to peaceful relations with the federal government.

Having thus stated the respective positions assumed by the parties, we proceed to their consideration, duly impressed with their magnitude and importance, and the responsibility imposed upon us. Inasmuch as the decision of these grave questions will involve a construction of the constitution of the United States, our inquiry into the separate and joint power of the President and Congress to make and declare war, and the legal consequences resulting from a state of war, we shall mainly rely upon the decisions of the Supreme Court and circuit courts of the United States.

It is claimed by the appellant that the account upon which this action is based was created during the existence of war between the State of Lousiana and the United States, and that by reason thereof commercial intercouse was prohibited and unlawful. The determination of this question will depend upon what constitutes war in a legal sense, in the sense of the law of nations, and of the constitution of the United States. The last item charged in the account against the appellant was for money paid on the 15th day of April, 1861, and the last item entered to his credit was on 29th day of April, 1861. Had the late rebellion, at either of these dates, become a civil war, with the legal consequences of war, as fixed by the law of nations?

The first case that came before the Supreme Court of the United States, that involved an injury into the late war was what is known as the Prize Cases, which decision was rendered at the December term, 1862, and is reported in 2 Black, 635. The court at the time was composed of nine judges. The decision was rendered by a divided court. GRIER J., delivered the opinion of the court. This opinion was concurred in by WAYNE, SWAYNE, MILLER and DAVIS JJ. The dissenting opinion was delivered by NELSON J., and was concurred in by TANEY, CATRON, and CLIFFORD, JJ. The first

vessel was captured on the 17th of May, 1861, the second on the 20th of May, 1861, and the third on the 10th of July, 1861. The majority of the court held that the President of the United States possessed the power under the consitution to declare war, and that the proclamation of blockade by the President on the 27th and 30th of April, 1861, was itself conclusive evidence that a state of war existed.

The minority of the court were of the opinion, that by the constitution, Congress alone had the power to declare war, and that, consequently, the late rebellion did not become a civil war until it was made such by proclmation of the President, on the 16th day of August, 1861, and which was under and by virtue of the power that was confered on him by the act of Congress, July 13th, 1861. The decision pronounced by the majority of the court has been overruled by several decisions rendered, and the opinion expressed by the minority of the court has since been approved and recognized as the law. We therefore feel entirely justified in quoting from the opinion delivered by NELSON. J.

NELSON, J., says, "In the case of a rebellion or resistance of a portion of the people of the country against the established government, there is no doubt, that if in its progress and enlargement the government thus sought to be overthrown sees fit, it may by the competent power recognize or declare the existence of a state of civil war, which will draw after it all the consequences and rights of a war between the contending parties, as in the case of a public war. Mr. Wheaton observes, speaking of civil war, 'But the general usage of nations regards such a war as entitling both the contending parties to all the rights of war, as against each other, and even as respects neutral nations.' It is not to be denied, therefore, that if a civil war existed between that portion of the people in organized insurrection to overthrow this government at the time this vessel and cargo were seized, and if she was guilty of a violation of the blockade, she would be lawful prize of war. But before this insurrection against the established government can be dealt with on the footing

of a civil war within the meaning of the law of nations and the constitution of the United States, which will draw after it belligerent rights, it must be recognized or declared by the war making power of the government. No power short of this can change the legal status of the government, or the relations of its citizens, from that of peace to a state of war or bring into existence all those duties and obligations of neutral third parties, growing out of a state of war.' Again he says:

"For we find that to constitute a civil war in the sense in which we are speaking, before it can exist, in contemplation of law, it must be recognized or declared by the sovereign power of the state, and which sovereign power by our constitution is lodged in the Congress of the United States; civil war, therefore, under our system of government can exist only by an act of Congress, which requires the assent of two of the great departments of government, the executive and legislative." Again he says:

"In the breaking out of a rebellion against the established government, the usage in all civilized countries, in its first stages, is to suppress it by confining the public forces and the operations of the government againt those in rebellion, and at the same time, extending encouragement and support to the loyal people, with a view to their co-operation in putting down the insurgents. This course is not only the dictate of wisdom, but of justice."Again he says:

"So the war carried on by the President against the insurrectionary districts in the Southern States, as in the case of the King of Great Britain in the American Revolution, was a personal war against those in rebellion, and with encouragement and support of loyal citizens with a view to their co-operation and aid in suppressing the insurgents, with this difference, as the war-making power belonged to the king, he might have recognized or declared the war at the begining to be a civil war, which would draw after it all the rights of a belligerent, but in the case of the President no such power existed; the war, therefore, from necessity, was

a personal war, until Congress assembled, and acted upon this state of things. Down to this period, the only enemy recognized by the government was the persons engaged in the rebellion, all others were peaceable citizens, entitled to all the privileges of citizens under the constitution. Certainly it cannot rightfully be said that the Pesident has the power to convert a loyal citizen into a belligerent enemy, or confiscate his property as enemy's property.

"Congress assembled on the call for an extra session on the 4th day of July, 1861. And among the first acts passed was one in which the President was authorized by proclamation to interdict all trade and intercourse between all inhabitants of states in insurrection and the rest of the United States, subjecting vessels and cargoes to capture and condemnation as prizes, and also to direct the capture of any ship or vessel, belonging in whole or in part to any inhabitant of a state whose inhabitants are declared by the proclamation to be in a state of insurrection, found at sea or in any part of the rest of the United States. Act of Congress of 13th of July, 1861, secs. 5 and 6. The fourth section also authorized the President to close any port in a collection district, obstructed so that the revenue could not be collected; and provided for the capture and condemnation of any vessel attempting to enter.

"The President's proclamation was issued on the 16th of August following, and embraced Georgia, North and South Carolina, part of Virginia, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida.

"This act of Congress, we think, recognized a state of civil war between the government and the confederate states, and made it territorial."

We next proceed to show that the opinion of the minority of the Supreme Court, in the above case, is now recognized as the law. GILES, J., in *Jackson Insurance Company* v. *Stewart*, in the Circuit Court of the United States, for the State of Maryland, says: "On the 7th of September, 1861, this court decided that the President of the United States

had the right, by proclamation, to recognize the existence of a state of civil war; and that the war, from and after the date of such proclamation, existed between the states mentioned in the proclamation and the rest of the United States. Also, that the late war, when so declared and recognized by President's Proclamation, became a civil war, and imposed upon both the belligerents all the rights and consequences of such a war. This was one of the earliest decisions in regard to our late civil war, and the principles there enunciated have since been fully confirmed by the Supreme Court of the United States in the Prize Cases; 2 Black, 635.

"The justices of that court were unanimons as to all the consequences which resulted from a state of civil war, but the four dissenting judges were of opinion that the war began only after the proclamation of the President, of August 16th, 1861, passed in pursuance of the power conferred upon him by the Act of July 13th, 1861.

"As regards to the State of Tennessee, there can be no doubt that war existed in consequence of the proclamation of the President, of August 16th, 1861, and not before, as that State was not included in the previous proclamations." 6 Amer. Law Reg. N. S. 732.

TREAT, J., in *United States* v. *One Hundred Barrels of Cement*, in United States District Court, Eastern District of Missouri, says, "All commercial intercourse with Tennessee was interdicted from the date of the President's proclamation of August 16th, 1861, except so far as the President had relaxed, or might relax, such interdict, with respect to any particular part of the State, or with respect to specified persons." Again, he says, "The Act of 1861 and the proclamation recognize this as an organized insurrection, extending over the states and parts of states named." 3 Amer. Law Reg. N. S. 735.

The court of Chancery of Louisville, Kentucky, in the case of *Allen* v. *Russell*, 3 Amer. Law Reg. N. S. 361, held that the act of Congress of 13th of July, 1861, and the President's Proclamation of 16th of August, 1861,

recognized an insurrection amounting to civil war as existing.

The Supreme Court of the United States, at the December term, 1870, in the case of *Dean* v. *Nelson*, reported in American Law Times, held that the late rebellion became a civil war by the proclamation of the President, of the 16th of August, 1861, issued in pursuance of the Act of Congress of July 13th, 1861. The court say, "The war soon began to rage with severity, and all intercourse between the states in rebellion and the other states of the Union was not only interrupted, but was prohibited by President Lincoln's proclamation of August 16th, 1861, made in pursuance of the act of Congress of the 13th of July previous." 10 Wall. 158.

It was held by the Circuit Court of the United States, in the District of Oregon, in the case of *Chapelle* v. *Olney*, that the late rebellion did not become a civil war until the 16th of August, 1861. The case was decided at the December term, 1870, and is published in American Law Times.

DEADY, J., after quoting the fifth section of the Act of Congress of July 13th, 1861, says, "This act was passed with direct reference to the rebellion or insurrection then being organized and maintained in certain states (including Arkansas), against the authority and government of the United States. In pursuance of this act, the President, on August 16th, 1861, by proclamation, declared the inhabitants of certain states, including Arkansas, to be in a state of insurrection against the United States, excepting, among others, the inhabitants of such parts of such states as may maintain a loyal adhesion to the Constitution and Union, or may be from time to time occupied and controlled by forces of the United States engaged in the dispersion of such insurgents.

"From and after the date of the proclamation of August 16th, 1861, all commercial intercourse was prohibited between the inhabitants of Arkansas and the people of the United States."

We are clearly of the opinion, from the above decisions, and our understanding and construction of the Constitution

of the United States, that the late rebellion did not become a civil war until it was made such by the proclamation of the President, on the 16th of August, 1861, made in pursuance of the act of Congress of the 13th of July, 1861, and that prior to that date, commercial intercourse between the citizens of Louisiana and the State of Indiana was lawful and would constitute a legal and valid consideration. As all the dealings between the parties to this action occurred prior to that date, it necessarily results that the cause of action in this case was not rendered unlawful and invalid by reason of a state of war.

But suppose that the opinion of the majority of the court in the Prize Cases was correct, and is still recognized as the law, how would that benefit the appellant? According to that decision, the rebellion did not become a civil war until the 27th of April, 1861, when the President issued his first proclamation of blockade. The last item in account of plaintiff was dated 15th of April, for money paid on draft of defendant. This payment was made before commercial intercourse became unlawful, under the above decision. It would deprive the appellant of the benefit of his corn received and credited on the 27th day of April, the day on which the proclamation was issued. Nor would the opinion of the majority of the court affect the statute of limitations in this case. Under the opinion of the majority of the court, the statute commenced on the 27th of April, 1861, while under the opinion of the minority of the court, it did not commence to run until the 16th of August, 1861. It is well settled by an unbroken line of decisions, both in England and in this country, that whenever a state of war existed, the debt and remedy were alike suspended—that the limitation ceased to run, and that the suspension of the debt and remedy did not cease, and the statute did not again commence to run, until the full restoration of peace, when the debt and remedy were fully restored.

But it is also maintained by the appellant that the court erred in overruling the demurrer to the complaint, because it affirm-

atively appeared on the face of the complaint that the cause of action had not accrued within six years next before the commencement of the action.

The rule was formerly well settled, that length of time was a proper ground for plea, and not for demurrer; but the very decided tendency of the later decisions is to hold, "that when the complaint discloses the fact that the plaintiff's right of action is barred by the statute of limitations, advantage may be taken of the bar by demurrer." This principle is discussed in the following cases: *Sturges* v. *Burton*, 8 Ohio St. 215; *McKinney* v. *McKinney*, 8 Ohio St. 423; *Chiles* v. *Drake*, 2 Met. Ky. 146; *Humbert* v. *Trinity Church*, 7 Paige, 195; 24 Wend. 587; Angell on Lim., 4th ed., sec. 29, p. 308; *Van Hook* v. *Whitlock*, 7 Paige, 375; Story Eq. Pl., secs. 378, 389, 390; *Wisner* v. *Barnet*, 4 Wash. C. C. 631; *Muir* v. *Trustees, &c.*, 3 Barb. Ch. 477; *Dunlap* v. *Gibbs*, 4 Yerg. 94; 1 Dan. Ch. Pr. 584; *Deloraine* v. *Browne*, 3 Bro. Ch. C. 633; *Thomas* v. *Harvie's Heirs*, 10 Wheat. 146; *Elmendorf* v. *Taylor*, 10 Wheat. 152; *Miller* v. *M'Intyre*, 6 Pet. 61; *Chapelle* v. *Olney*, Oregon C. C., Amer. Law Times.

But the law seems to be settled otherwise in this and many of the other states. In *Sipe* v. *Sipe*, 14 Ind. 477, the court say, "The time laid in the complaint should bring the case within the statute of limitations, and the proof should, perhaps, show that the acts complained of preceded the grant of letters of administration."

In *Bowman* v. *Mallory*, 14 Ind. 424, the court say that the statute of limitations should be pleaded, and refer to Perkins' Pr. 226.

In *Matlock* v. *Todd*, 25 Ind. 128, the court say, "But we do not decide the question, for the reason that it is not properly before us. It is raised on a demurrer to the complaint, and it has been held by this court, that in suits at law, to make the statute availing, it should be pleaded. *Bowman* v. *Mallory*, 14 Ind. 424."

In *Hanna, Adm'r* v. *The Jeffersonville R. R. Co.*, 32 Ind.

113, this court say, "It only remains to ascertain whether the point can be raised in this case by demurrer to the complaint. Ordinarily, the statute of limitations must be pleaded, though the fact appear by the averments of the complaint. The reason for this is, that usually there are exceptions to statutes of limitations, and the plaintiff should, therefore, have the opportunity of replying to the plea, so that he may show that the case is within any of the exceptions. To compel him to make these averments in the complaint would tend to inconvenient and needless prolixity. But in the case before us there are no exceptions, and consequently there is no reason why the defendant should plead the fact. There could be no reply avoiding the plea. The plaintiff brings upon the record all the facts concerning the matter that would be of service to either party, and the answer would be but a repetition of them, accomplishing no useful end. We think, therefore, that the question was properly raised by the demurrer, and that it was correctly sustained."

But if the statute of limitations was properly raised by demurrer, it would not avail the appellant in this case. The complaint shows that the plaintiff then was, and had been since 1858, a citizen of the State of Louisiana, and that the defendant then was, and during the war had been, a citizen of the State of Indiana. It was the duty of the court below, as it is of this court, to take judicial notice of the fact that the State of Louisiana was in a state of insurrection against the United States, and that the State of Indiana maintained a loyal adhesion to the Constitution and Union.

In the case of *Chapelle* v. *Olney*, *supra*, the court say, "The plaintiff is not required to anticipate the defense of the statute of limitations, nor could the defendant at common law claim the benefit of it, unless he pleaded it. But under the code, when it appears from the statement of the cause of action in the complaint, that it did not accrue within the limitation prescribed by law, the defense may be made by demurrer. In such case I suppose the plaintiff may anticipate the defense by

stating in the complaint any special matter which he relies upon to take the case out of the statute, or otherwise the demurrer will be sustained. But, as in this case, if such special matter is within the judicial knowledge of the court, it need not be stated in the complaint.

"Here it appears upon the face of the complaint that the action was not commenced within six years from the time it accrued. If this were all, a demurrer that the action had not been commenced within the time limited, would be a good defense. But it is also judicially known to the court that the inhabitants of Arkansas—which description includes the plaintiff, under the allegations of the pleadings—were in a state of insurrection against the United States, for a sufficient period after the action accrued, to take the case out of the statute. But at this point the defendant asks the court to assume that Cross county was, during this time, within the exception in the proclamation, that is, was either loyal to the Union, or occupied by the forces of the United States, and, therefore, not in a state of insurrection. Now, this is a matter of which the court cannot take judicial notice. The proclamation declares the whole state to be in a state of insurrection. No particular exceptions to this condition are recognized as then existing. The exceptions made relate to no particular person or place, but only to such persons or places as may possibly then or thereafter—particularly thereafter—'maintain a loyal adhesion to the Union and Constitution,' or be 'occupied and controlled by the forces of the United States.' The exception in regard to the State of Virginia is positive and definite. It relates to the inhabitants of that part of the state lying west of the Alleghany mountains. If, then, the particular portion of Arkansas in which the plaintiff resided during the hostilities between the United States and the southern confederacy, was, as a matter of fact, loyal to the Union, or occupied and controlled by the United States forces, and, therefore, not in a state of insurrection, and the defendant relies upon these facts to bring the case within the

bar of the statute, he should plead them, and be prepared to prove them on the trial." It is quite clear that the court committed no error in overruling the demurrer to the complaint.

The appellant, in the second paragraph of his answer, pleaded the statute of limitations. The appellee attempted to avoid the statute by the matters alleged in the fourth paragraph of the reply, to which the appellant demurred. The demurrer was overruled, and an exception taken, and this ruling is assigned for error. We have reached the conclusion that the late rebellion did not become a civil war until the 16th of August, 1861. The decision of the point now under consideration will depend upon the legal consequences that resulted from a state of civil war, and this divides itself into two propositions: the first is, whether the law of nations applies to and governs a civil war, in the same manner and to the same extent that it does to a foreign war; and the second is, whether the war suspended the plaintiff's right of action during the existence of the war.

Wheaton says, "But the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations." The authorities are all to the same effect. Prize Cases, 2 Black, 635.

In the case of *Hanger* v. *Abbott*, 6 Wall. 532, the court say: "In former times the right to confiscate debts was admitted as an acknowledged doctrine of the law of nations, and in strictness it may still be said to exist, but it may well be considered as a naked and impolitic right, condemned by the enlighted conscience and judgment of modern times. Better opinion is that executed contracts, such as the debt in this case, although existing prior to the war, are not annuled or extinguished, but the remedy is only suspended, which is a necessary conclusion, on account of the inability of an alien enemy to sue or sustain, in the language of the civilians, *a persona standi in judicio.* * * *

"Total inability on the part of an enemy creditor to sustain

any contract in the tribunals of the other belligerent exists during war, but the restoration of peace removes the disability, and opens the doors of the courts. Absolute suspension of the right, and prohibition to exercise it, exist during war by the law of nations, and if so, then it is clear that peace cannot bring with it the remedy if the war is of much duration, unless it also be held that the operation of the statute of limitations is also suspended during the period the creditor is prohibited, by the existence of the war and the law of nations, from enforcing his claim."

An alien enemy cannot sue, nor can he be heard as claimant in the courts of the belligerent captors. *The Adventure*, 8 Cranch, 221; *The Anne*, 3 Wheat. 435; *The Mariana*, 6 C. Rob. Admr. 24; *The Schoone Sophie*, *id*, 138; *The Falcon*, *id.* 194; *The Eliza Ann*, 1 Dods. 244; *The Flotina*, *id.* 450; 3 Phillm. Int. Law, sec. 461; *The Juffrow Maria Schroeder*, 3 C. Rob. Adm. 147; *The Pearl*, *id.* 199; *The Boedes Lust*, *id.* 207; *The Eenrom*, 2 *id.* 1; *The Frances*, 8 Cranch. 354; *The Frances*, *id.* 418; *Bolchos* v. *Darrell*, Bee, 74; *Rapalje* v. *Emory*, 5 Dall. 51; *Ware* v. *Hylton*, 3 *id.* 199; *The Rebeckah*, 1 C. Rob. Adm. 190; *The Rapid*, 1 Gallis. 295; *Jecker* v. *Montgomery*, 18 How. U. S. 110; *Griswold* v. *Waddington*, 16 Johns. 438.

The court of appeals of Kentucky in *Norris* v. *Doniphan*, held that a citizen of Arkansas could not maintain an action in the courts of Kentucky by reason of the existence of war.

The next question arising in the record is, when did the war end and the statute of limitations commence running, in this case?

In *United States* v. *Anderson*, 9 Wall. 56, the question arose, when was the rebellion entirely suppressed? The circumcumstances were these; what is called the captured and abandoned property act passed March 12th, 1863, 12 Stat. at Large, 820, gave to the loyal owners of such property a right to bring suit against the United States in the court of claims to recover the proceeds thereof, " at any time within

two years after the suppression of the rebellion." Anderson, a resident of Charleston, South Carolina, on June 5th, 1868, commenced an action to recover the proceds of certain cotton seized and sold by the United States. The defense was that the action was barred by the limitation in the act of March 12th, 1863, or in other words, that the action was not commenced within the two years after the suppression of the rebellion.

By an act of Congress passed March 2d, 1867, (14 Stat. at Large, 422) it was declared that the act passed June 20th, 1864, (13 Stat. at Large, 144) to increase the pay of the army, should be continued in full force and effect for three years after the close of the rebellion announced by the President of the United States by proclamation bearing date August 20th, 1866.

The court held that the limitation of two years did not commence to run until the rebellion was suppressed throughout the whole country, and that the proclamation of August 20th, 1866, was the first official declaration on the part of the executive that the rebellion was wholly suppressed. The court also held that the act of March 2d, 1867, was so far a legislative recognition of the proclamation declaring the insurrection at an end thoughout the United States on August 20th, 1866, and that that day would be considered as the day when the rebellion was suppressed, as respects the rights intended to be secured by the captured and abandoned property act.

The court also expressed the opinion that there is no reason why this declaration of Congress should not be received as settling the question of when the rebellion was suppressed, wherever private rights are affected by it. But the court premised this dictum by the declaration that it did not intend to decide any more than the question, when was the rebellion entirely suppressed, within the meaning of the limitation clause in the captured and abandoned property act?

This decision is generally regarded as decisive of the question when peace was restored, and when the legal consequences of a state of peace became operative. This deci-

sion seems to be regarded as binding upon the circuit and district courts, and they have applied the law as announced by the Supreme Court as applicable to persons claiming under the captured and abandoned property act to suits between citizens where "private rights" are involved.

The next question presented for our consideration and decision is, what effect did the occupation of the city of New Orleans, on the 6th of May, 1862, by the forces of the United States, have upon the rights of the parties to this action? By the 5th section of the act of Congress of the 13th of July, 1861, it was enacted, that "whenever" the militia called forth by the President had failed to disperse insurgents in any state against the national authority, it should be lawful for the President, by proclamation, to declare that the inhabitants of such state, or part of a state, were in a "state of insurrection against the United States;" and thereupon the statute proceeded:

"All commercial intercourse by and between the same and citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue; and all goods and chattels, wares and merchandise, coming from said state or section into the other parts of the United States, and all proceeding to such state or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such state or section, be forfeited to the United States."

The section contained, however, this proviso: "That the President may, in his discretion, license and permit commercial intercourse with any such part of said state or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest; and such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury."

President Lincoln, on the 16th of August, 1861, made such proclamation as the act itself authorized, declaring that the inhabitants of several states, which he named, including Louisiana, "except the inhabitants of that part of Virginia lying west of the Alleghany mountains, and such other parts of that state, and the other states hereinbefore named, as may maintain a loyal adhesion to the union and constitution, or may be from time to time occupied and controlled by forces of the United States engaged in the dispersion of such insurgents, are in a state of insurrection against the United States, and that all commercial intercourse between the same and the inhabitants thereof, with the exceptions aforesaid, and the citizens of other states and other parts of the United States is unlawful and will remain unlawful until such insurrection shall cease or has been suppressed," &c.

The proclamation of the President embraced the entire State of Louisiana, and included all the inhabitants thereof. There were no exceptions made as to places or persons in the said state. The Supreme Court of the United States, in the matter of *The Venice*, 2 Wal. 258, say:

"While these transactions were in progress (April, 1862), the war was flagrant. The States of Louisiana and Mississippi were wholly under rebel dominion, and all the people of each state were enemies of the United States. The rule which declares, that war makes all the citizens or subjects of one belligerent enemies of the government and of all the citizens or subjects of the other, applies equally to civil and to international wars."

The inhabitants of the States of Lousiana and of Indiana were enemies, and all commercial intercourse between them was prohibited and unlawful, unless they came within the exceptions named in the proclamation of the President above quoted. It is not claimed that any part of the State of Louisiana or of the inhabitants thereof, except the city of New Orleans and its inhabitants, came within the exception named in the proclamation. The occupation of the city of

New Orleans by the forces of the United States became complete on the 6th day of May, 1862.

The question arises, what was the legal effect of such occupation? This depends upon the construction to be placed upon the proviso to the fifth section of the act of Congress of 13th of July, 1861, and the exceptions contained in the proclamation of the President on the 16th of August, 1861. It will be perceived that the decisions of the Supreme, circuit, and district courts of the United States have not been uniform and consistent, and this will render necessary an examination of all these decisions, with the view of ascertaining the recognized and established doctrine on this subject. The want of uniformity and the apparent conflict in the decisions of the federal courts seem to have resulted from the fact that some of the decisions are based upon the proclamation of the President, while others are based on the fifth section of the act of Congress of 13th of July, 1861. The proclamation does not conform to the act of Congress. The proviso to the 5th section refers solely and expressly to commercial intercourse between the inhabitans of a state or part of a state that may be declared to be in a state of insurrection. The act of Congress makes it the duty of the President, in a certain contingency therein named, "to declare that the inhabitants of such state, or any section or part thereof, where such insurrection exists, are in a state of insurrection against the United States; and thereupon all commercial intercourse by and between the same, and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue;" and the President having declared such state and inhabitants to be in a state of insurrection, he is invested by the proviso with the discretionary power to "license and permit commercial intercourse with any such part of said state or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest; and such intercourse, so far

as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury." The evident purpose of Congress was to place all the inhabitants in a state of insurrection and render unlawful all intercourse, except as the President might by special license, or permit, allow trading. The exception does not apply to anything except trading by special license, and does not release the inhabitants from any other disability produced by a state of war. The proclamation of the President applies the exception to the condition of insurrection, and not to commercial intercourse by special license after the inhabitants are declared to be in a state of insurrection. The construction of the act of Congress and proclamation of the President was first involved in the matter of *The Venice*, 2 Wal. 258, where the court say:

"This legislative and executive action relates, indeed, mainly to trade and intercourse between the inhabitants of loyal, and the inhabitants of insurgent parts of the country, but by excepting districts occupied and controlled by national troops from the general prohibition of trade, it indicated the policy of the government not to regard such districts as in actual insurrection, or their inhabitants as subject, in most respects, to treatment as enemies. Military occupation and control, to work this exception, must be actual; that is to say, not illusory, not imperfect, not transient; but substantial, complete, and permanent. Being such, it draws after it the full measure of protection to person and property consistent with a necessary subjection to military government. It does not, indeed, restore peace, or in all respects, former relations, but it replaces rebel by national authority, and recognizes, to some extent, the conditions and responsibilities of national citizenship."

This is the earliest decision of the Supreme Court on the question under consideration. It is not full, accurate, or perspicuous. It decides that the occupation of New Orleans by the forces of the United States did not restore peace or the former relation, but that it recognized to some extent the

conditions and responsibilities of national citizenship. But we are not informed what condition and responsibilities are recognized, or to what extent they are so recognized. If there is anything that is clearly settled by this decision, it is that a permanent occupation draws after it "the full measure of protection of persons and property."

The same court, at the same term, in the matter of *The Circassian*, held that the capture of the forts and occupation of the city of New Orleans did not terminate the blockade of New Orleans, but, on the contrary, made it more complete and absolute. See 2 Wal. 135.

In the subsequent case of *The Reform*, 3 Wal. 617, the principal defense upon the merits was, that the vessel, with the cargo, was engaged, at the time of the seizure, in a lawful voyage under a license from the Secretary of the Interior, issued by the express authority of the government. The court say:

"Such a defense, unquestionably, may be valid, and if fully proved, the decree of the circuit court must be affirmed. Authority was conferred upon the President, by a proviso of the section under consideration, to license and permit, in his discretion, commercial intercourse, in the interdicted states or places, in such articles, and for such time, and by such persons, as he might think most conducive to the public interests; but all such intercourse was to be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury."

Again, it is said by the court: "Proclamation of the President, of the sixteenth of August, 1861, which declared that certain states and parts of states were in insurrection, expressly excepted from that condition those districts, or parts of the same, which might be 'from time to time occupied and controlled by the forces of the United States engaged in the dispersion of the insurgents.' Intercourse for commercial purposes was not prohibited with such places or districts while so occupied and controlled. They were not regarded, as this court said in the case of *The Venice*, 'as in

actual insurrection, or their inhabitants as subject in most respects to treatment as enemies.'

"Such intercourse, however, with any such state, place, or district, so occupied and controlled, was absolutely forbidden, unless the person or persons conducting it were furnished with a license and permit of the President, and conformed in all respects to the treasury rules and regulations."

The court held that the Secretary of the Interior possessed no power to issue a license and permit, and that the vessel and cargo were lawfully subject to seizure.

This decision settles two propositions that have an important bearing upon the question under consideration. The first is, that all intercourse with a place "occupied and controlled by the forces of the United States engaged in the dispersion of the insurgents" was prohibited, except "intercourse for commercial purposes."

The second is, that "intercourse for commercial purposes was absolutely forbidden, unless the person or persons conducting it were furnished with a license and permit of the President, and conformed in all respects to the treasury rules and regulations."

The President, by his proclamation, had declared the entire State of Louisiana and all of her inhabitants to be in a state of insurrection against the United States, which made all of such inhabitants the enemies of the government and all the inhabitants of the states that adhered to the government, and had prohibited all kinds of intercourse except commercial intercourse, under the license and permit of the President. If such was the condition of things, upon what principle can it be maintained that such places were not "in actual insurrection," or "their inhabitants" were not "subject in most respects to treatment as enemies." If such places and their inhabitants were not in insurrection, the government possessed no power under the laws of war, the acts of Congress, or the constitution of the United States, to blockade the ports or prohibit intercourse between them and the inhabitants of the other states. The constitution of the United States ex-

pressly provides, that "the citizens of such state shall be entitled to all privileges and immunities of citizens of the several states." The inhabitants of New Orleans could not be deprived of those privileges and immunities, unless they were in a state of insurrection against the government of the United States. This court is unwilling to believe that the highest judicial tribunal of this country intended to hold that the government of the United States had blockaded the ports and deprived the inhabitants of one of the states of this Union of the privileges and immunities secured to them by the paramount law of the land, when such state or part thereof was not in actual insurrection, and when the inhabitants thereof were not subject to treatment as enemies, but we prefer to believe that the expression used in the case of *The Venice*, and afterwards referred to in the case of *The Reform*, was a loose and unguarded expression, which was not at all necessary to the decision of the cases.

The Supreme Court, in the case of *The Peterhoff*, 5 Wal. 28, said: "It has been held, by this court, that persons residing in the rebel states at any time during the civil war, must be considered as enemies, during such residence, without regard to their personal sentiments or dispositions. *The Prize Cases*, 2 Black, 635; *The Venice*, 2 Wal. 258; *Mrs. Alexander's Cotton*, *id.* 404.

"But this has never been held in respect to persons faithful to the Union, who have escaped from those states, and have subsequently resided in the loyal states or in neutral countries. Such citizens of the United States have lost no rights as citizens by reason of temporary and constrained residence in the rebellious portion of the country."

In this case the doctrine is broadly stated, that persons residing in the rebel states at any time during the civil war must be considered enemies during such residence, without regard to their personal sentiments or dispositions.

It was held by the Supreme Court, in the case of the *United States* v. *Weed*, 5 Wal. 62, that the property seized was not liable to seizure, because the owner was a loyal citizen of New

Orleans and had a license and permit from the President, in conformity to the rules and regulations prescribed by the Secretary of the Treasury.

The Supreme Court, in the case of *The Sea Lion*, 5 Wal. 630, held that the vessel was liable to capture, for the reason that the owner was not protected by a license and permit of the Secretary of the Treasury; that the President alone possessed the power, by his license and permit, to render lawful commercial intercourse with the inhabitants of the rebellious states.

The Supreme Court, in the case of *McKee* v. *The United States*, 8 Wal. 163, say: "It is a familiar principle of public law, that unlicensed business intercourse with an enemy during a time of war is not permitted. Congress, therefore, in recognition of this principle, when it declared on the 13th of July, 1861, that commercial intercourse between the seceding states and the rest of the United States should cease and be unlawful, after the proclmation of the President that a state of insurrection existed, authorized the President, in his discretion, to license trade. But in so far as it was licensed, it was to be conducted in accordance with the regulations prescribed by the Secretary of the Treasury. The President proclaimed the fact of insurrection, and provided for a limited commercial intercourse, and the Secretary of the Treasury fixed the manner in which this intercourse should be carried on."

Judge TREAT, in the case of *The United States* v. *One Hundred Barrels of Cement*, 3 Am. Law Reg. N. S. 742, states the law thus: "Hence the rule, as laid down by publicists, that an alien enemy cannot sue, is so phrased because an alien may be in a state of amity as well as of enmity. As his *persona standi* depends on his friendly or hostile status, the term 'enemy' is used in connection with the word alien, to designate that hostile status. The claimants here are not aliens, they are not technically enemies, they are only 'enemies in a qualified sense,' as Justice NELSON has correctly said. They still owe paramount allegiance to the United States, are not citizens of any other recognized power. They are *de jure* subject to the United States laws. Those laws

forbid them to carry on commercial intercourse with the loyal states, except on the conditions named. The prohibition rests not on the law of nations, but on municipal statute or act of sovereignty, and the exception to the general prohibition is created by the same act. It was probably the intent of Congress to allow such discriminations to be made between the loyal and disloyal in the insurrectionary states, as the exigencies of the government would from time to time permit. Hence the power lodged in the President by the terms of the proviso to the fifth section, under which the permit in this case was obtained; also the terms of section 8, as to remission of forfeitures. The condition of *quasi* enmity, under which all the inhabitants of Tennessee were placed by the proclamation, was subject therefore to those exceptions, as to districts and persons, which the President might make from time to time. The temporary disqualification covering all its inhabitants is removed as to those who have special exemptions granted to them, which exemptions are evidenced by license duly obtained. Alienage the President could not remove, if it existed, but the legal status of *quasi* enmity, or hostility, as to districts, or individuals thereof, he is especially empowered to remove. Hence, the simple fact that the claimants are citizens of Tennessee, might, in the absence of any other fact, deprive them temporarily of the right to sue, or appear as claimants here; but when the other fact is proved, that they have been relieved of that temporary disability, their *persona standi in judicio* must be considered as fully restored, Such is the rule under this statute, and such is also the rule, as will be shown, in analogous cases during foreign wars."

The same learned judge, in the case of *United States* v. 129 *Packages*, 2 Am. Law. Reg. N. S. 430, says: "In short, the status of the country, as to peace or war, is legally determined by the political, and not the judicial department. When the decision is made, the courts are concluded thereby and bound to apply the legal rules which belong to that condition. The same power which determines the existence of war or insur-

rection, must also decide when hostilities have ceased; that is, when peace is restored. In a legal sense, the state of war or of peace is not a question *in pais* for courts to determine. It is a legal fact ascertainable only from the decision of the political department. *Gelston* v. *Hoyt*, 3 Wheat. 246; *The U. S.* v. *Palmer, id.* 610; *The Divinia Pastora*, 4 Wheat. 52; *The Neustra Senora de la Caridad, id.* 497; *The Santissima Trinidad*, 7 Wheat. 283; *Martin* v. *Mott*, 12 Wheat. 19; *Rose* v. *Himely*, 4 Cranch, 241; *Foster* v. *Neilson*, 2 Pet. 253; *Garcia* v. *Lee*, 12 Pet. 511; *M'Elmoyle*, v. *Cohen* 13 Pet. 312; *Luther* v. *Borden*, 7 How. U. S. 1; *Kennett* v. *Chambers*, 14 How U. S. 38; *Christy* v. *Scott, id.* 282.

"Under the act of July 13th, the President, on the 16th of August, 1861, proclaimed Tennessee in a state of insurrection. The legal status thus determined must remain so long as the condition of hostility continues. He has never made a counter proclamation, nor has peace been officially announced. As a legal condition, that status is independent of actual daily strife in arms. A legal condition of hostilities may exist between this and a foreign nation long after the last battle has been fought between the opposing armies. That condition ceases when peace is concluded through competent authority, not before."

The circuit court of the United States for the district of Connecticut, in case of *Sommes* v. *The Fire Ins. Co.*, 4 Am. Law Review, 175, says: "When war has existed between the United States and a foreign country, its termination is easily ascertained by reference to the treaty of peace which follows it, and which is consummated by the President, acting by and with the advice of two thirds of the Senate. As no such treaty did, or could, mark the close of this civil war, we must look to the action of the President or Congress, or both, and from that action ascertain when the war ended, and when the legal consequences which flowed from it ceased to act in any given case."

In the case of *Jackson Ins. Co.* v. *Stewart*, in the circuit court of the United States for the State of Maryland, GILES,

Justice, says: "It is a well settled principle, that contracts made before war are only suspended by the war, whereas contracts made during the war are void. This principle is fully recognized by the Supreme Court in regard to our late civil war.

"In ancient times private property of alien enemies, and debts of every kind, were confiscated to the state. Happily all this has been changed in modern times, and now, while contracts made during war between alien enemies are absolutely void, being against public policy, private interests are protected, and *bona fide* contracts made before the breaking out of a war are suspended during its existence, but revive at its termination. To the honor of the United States and Great Britain, be it said that these rights have always been respected by them.

"It has been repeatedly decided, by both state and federal courts, that where, by a legislative enactment, parties are prevented from prosecuting their claims, the interval during which such prevention lasts is not to be counted as part of the time allowed by the statute of limitations. Now, the power to make war and peace is, by the constitution of the United States, delegated exclusively to the federal government; and as during the war the plaintiff, being a corporation of the State of Tennessee, had no right to bring suit against the defendant, who was a citizen of Maryland, the Maryland statute of limitations was suspended during such period.

"The general rule unquestionably is, that where the statute of limitations has once begun to run, no subsequent disability will arrest it. But we have already seen that a legislative enactment supends the running of the statute, and the same result follows from the declaration of war by the supreme power of the land.

"For it is a well recognized principle of the law of nations, that the right of a creditor to sue for the recovery of his debt is not extinguished by the war; it is only suspended during the war, and revives in full force on the restoration

of peace. A war then certainly existed between Tennessee and the federal government, from the President's proclamation of August 16th, 1861, and although a civil war, yet, according to the decision of the Supreme Court in the *Prize Cases*, it carried with it all the consequences and disabilities of a public war, one of which (as we have seen) was the suspension of the right to sue during the war. It follows, therefore, that the plaintiff in this case could have instituted no proceedings in this court until peace was proclaimed by the President's proclamation of June 13th, 1865.

"This suspension being by the exercise of the paramount authority of the government, cannot he held to work a forfeiture of a plaintiff's cause of action; but that his right to sue, suspended by the war, revived when it ceased. And as it has not been three years from the maturity of the cause of action to the commencement of the war, and from the termination of the war to the commencement of this suit, the suit is not barred by limitation, and the demurrer is therefore overruled."

In *Brown* v. *Hiat*, in the circuit court of U. S., district of Kansas, reported in Am. Law Times for March, 1871, which was an action brought by a person who was a citizen of Virginia during the war, against a person who was a citizen, during said time, of Kansas, the defendant pleaded the statute of limitations, to which the plaintiff replied the existence of war.

DILLON, C. J., says: "In arriving at this conclusion, viz., that unlicensed intercourse during the war was unlawful, and that pre-existing contracts are only suspended by it, the Supreme Court has frequently had occasion to refer to the legislation of Congress, and particularly to the important act of July 13th, 1861, the essential prohibitions of which continued in force during the whole period of the rebellion.

"It is important to notice with care the provisions of the fifth section of this statue (12 Stat. at Large, 225, 257).

"It authorizes the President to proclaim and declare, 'inhabitants' of certain states or any section or part thereof, to be in a state of insurrection against the United States, and there-

upon all commercial intercourse, by and between the same, and the citizens thereof and the citizens of the rest of the United States, shall cease and be unlawful so long as such condition of hostility shall continue; and all goods, etc., coming from said state or section into the other parts of the United States, and all proceeding to such states or section by land or water, shall, together with the vessel or vehicle conveying persons to or from such state or section, be forfeited to the United States.

"Then follows a provision authorizing the President, in his discretion and for the public interest, to permit intercourse under regulations to be prescribed by the Secretary of the Treasury.

"The statute is a valid exercise of legislative power, for the Congress of the United States was not, by the rebellion, deprived of the power to legislate in this manner with a view to its suppression.

"Its prohibition of intercourse is as broad as the prohibition of the law of nations in the case of a war between independent states. By recurring to the act, it will be seen to extend to 'all' unlicensed 'commercial intercourse.'

"It admits of no exceptions as to persons, for it prohibits intercourse not simply between citizens of the insurrectionary states who were in fact disloyal, and citizens of loyal states, but it makes unlawful all unlicensed intercourse between all citizens of the states of hostile sections. All goods are prohibited to come from the insurrectionary sections into the other parts of the United States, and all goods are prohibited likewise from being sent from loyal to disloyal states. Vessels and vehicles are prohibited from conveying persons to or from the respective states or sections.

"It is obvious that this act contemplates a condition of entire non-intercourse of a pacific character between the two opposing sections, except such as should be authorized by the President 'for the public interest.'

"What is the necessary effect and consequence of this condition? It is the same as when a war existed between inde-

pendent nations. All existing contracts between citizens of the different sections are suspended; this from necessity, because the act forbids all intercourse, and intercourse is essential in order to fulfil, or perform, or enforce contracts. The courts of the one section are shut, by the act of Congress, to the people of the other, for citizens of the insurrectionary states are forbidden to come into the other states, or hold any intercourse with their people, and without this, suits cannot be instituted or carried on, and the same is true as to citizens of the loyal states.

"It is manifest from the foregoing that the complainant, was he ever so loyally disposed towards the Union, had, by reason of his domicil in a state declared to be in insurrection, no right to institute or maintain, during the war, a suit in the courts of the United States or of Kansas, for the recovery of his debt against the respondent. In a proceeding of this nature the courts cannot, under the act of July 13th, 1861, inquire whether the particular plaintiff was loyal to the Union or aided the rebellion; for if he was a citizen of a rebellious state he is regarded as an enemy, irrespective of his personal sentiments, sympathy, or acts. *Mrs. Alexander's Cotton*, 2 Wal. 404; *The Venus*, 8 Cranch, 253; *The Indian Chief*, 3 C. Rob. Adm. 12; *The Friendschaft*, 4 Wheat. 105. We may observe that it has been accordingly held by courts and judges of great respectability, that citizens of rebellious states could not, during the recent war, maintain suits in the courts of the other portions of the United States."

In the case of *Chapelle* v. *Olney*, *supra*, the court say, "From and after the date of August 16th, 1861, all commercial intercourse was prohibited between the inhabitants of Arkansas and the people of the United States, and the transportation or removal of property to or from Arkansas and other parts of the United States, not declared to be in a state of insurrection, was punishable by forfeiture thereof. For the time being, the plaintiff was a citizen or inhabitant of a country at war with the United States, and therefore could not maintain an action in the courts within this State,

against the defendant, to secure this money. 1 Kent Com. 66. The plaintiff's remedy was suspended until the cessation of hostilities and the restoration of peace and lawful intercourse between the people of the two countries. *Ibid*, 68.

"The next question to be considered is, when did this state of insurrection or hostilities cease? Without stopping to consider whether the President has any power to declare the beginning or ending of an insurrection, except in pursuance of legislative authority, and conceding that all power over questions of war and peace, domestic or foreign, is vested by the constitution in Congress, except that vested in the treaty-making power, I am of the opinion that the authority conferred upon the Executive by the act of July 13th, 1861, to declare Arkansas in a state of insurrection, impliedly authorized him, if the state of things amounting to such insurrection should cease or change, to then declare it at an end, unless in the meantime Congress had otherwise provided. Assuming that the insurrection as to Arkansas was at an end from and after the proclamation in April 2d, 1866, the remedy of the plaintiff, the right to sue defendant for his money, was suspended for four years, seven months, and sixteen days. Deducting this period from the time between the accruing of the right of action and the commencement of this action, leaves five years, one month, and one day, a period of eleven months and twenty-nine days less than that allowed by law within which to begin the action. This view of the matter is the most favorable one that can be taken for the defendant, for there is no ground upon which the court can assume that the insurrection, including the prohibition of intercourse between the people of the United States and Arkansas terminated at an earlier date. Actual war, the marching of hostile forces, and the conflict of opposing armies in battle, may have ceased sooner, but this proclamation is the earliest act of the government to which the attention of the court has been called, which purports or has the effect to relieve the inhabitants of Arkansas from the status

of insurrection and consequent non-intercourse, in which they were placed by the proclamation of August 16th, 1861."

The United States Circuit Court for the District of Connecticut, in the case *supra*, say, "I have already shown that by the rules of public law universally recognized among civilized nations, as well as by the decisions of our own courts, the existence of this war suspended all contracts between the citizens of the respective belligerents entered into before it commenced. It rendered, for the time being, all commercial intercourse between the citizens of the two sections unlawful, and converted them into enemies. But in addition to this, Congress passed an act July 13th, 1861, authorizing the President, in certain cases, by proclamation, to declare the inhabitants of a state in insurrection against the United States, whereupon all commercial intercourse by and between the same and the citizens thereof, and the citizens of the rest of the United States, should become unlawful. In pursuance of this statute, the President, on the 16th of August, 1861, issued his proclamation declaring the inhabitants of certain states, including Mississippi, in insurrection against the United States, By force of this proclamation, then, and the statute authorizing it, as well as by the force of the legal effect of the war then existing, all pre-existing contracts between the people of the respective belligerents, including the right to enforce them by judicial proceedings, were thenceforth suspended."

Again, the court say, "It follows from these principles that the contract upon which this suit is founded, though suspended during the war, while intercourse between the citizens of the belligerent sections was unlawful, revived on the 13th of June, 1865, and from that date was in full force. From that time there has been no legal obstacle to its enforcement."

We have heretofore shown that the Supreme Court of the United States has decided that peace was not restored until the 20th of August, 1866, and, consequently, that that is to be regarded by the courts as the time when the statute of limita-

tions would commence to run upon debts that were created prior to, and were suspended by, the war, instead of the 13th of June, 1865, as fixed by the court in the Connecticut case.

In the case of *Texas* v. *White*, 7 Wal. 726, the Supreme Court of the United States held that the State of Texas continued to be a state, and a state of the Union, during the continuance of the war. After having established that proposition, CHASE, C. J., proceeded to consider the relation that the state and its people sustained to the United States. He says, "And it is by no means a logical conclusion, from the premises which we have endeavored to establish, that the governmental relations of Texas to the Union remained unaltered. Obligations often remain unimpaired, while relations are changed. The obligations of allegiance to the state, and of obedience to her laws, subject to the Constitution of the United States, are binding upon all citizens, whether faithful or unfaithful to them; but the relations which subsist while these obligations are performed are essentially different from those which arise when they are disregarded and set at naught. And the same must necessarily be true of the obligations and relations of states and citizens to the Union. No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, senators chosen by her legislature, or representatives elected by her citizens, were entitled to seats in Congress; or that any suit, instituted in her name, could be entertained in this court. All admit that, during this condition of civil war, the rights of the state as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the state, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion."

CHASE, C. J., in the case of *Thorington* v. *Smyth*, 4 Am. Law Rev. 380, says, "We have already seen that the people of the insurgent states, under the confederate government, were, in legal contemplation, substantially in the same condi-

tion as inhabitants of districts of a country occupied and controlled by an invading belligerent. The rules which would apply in the former case would apply in the latter, and, as in the former case, the people must be regarded as subject to a foreign power, and contracts among them be interpreted and enforced with reference to laws imposed by the conqueror; so in the latter case the inhabitants must be regarded as under the authority of the insurgent belligerent power, actually established as the government of the country, and contracts made with them must be interpreted and enforced with reference to the condition of things created by the acts of the governing power."

The contract sued on in the above case was made between parties residing within the so-called Confederate States, and during the war. The question in the case was, whether such a contract could be enforced at all in the courts of the United States, and the Supreme Court held that it could be enforced, for the reason that the "inhabitants must be regarded as under the insurgent belligerent power actually established as the government of the country." If this was the condition of the inhabitants of the insurgent states, they could have no personal standing in our courts.

We will refer to but one more decision of the Supreme Court of the United States, and in our opinion the principles therein enunciated are decisive of the question under consideration. It is the case of *The Grapeshot*, 9 Wal. 129. The facts upon which the decision of the court was based were these: Louisiana became involved in the rebellion, and the courts and officers of the United States were excluded from its limits. In 1862, the city of New Orleans was occupied and controlled by the forces of the United States, by which the national authority had been re-established in the state, though still liable to be overthrown by the vicissitudes of war. On the 20th of October, 1862, the President, by proclamation, instituted a provisional court for the state. Upon the restoration of civil authority in the state, the provisional court, limited in duration, according to the terms of

the proclamation, by that event, ceased to exist. On the 28th of July, 1866, Congress enacted that all suits, causes, and proceedings in the provisional court, proper for the jurisdiction of the circuit court of the United States for the eastern district of Louisiana, should be transferred to that court, and heard and determined therein; and that all judgments, orders, and decrees of the provisional court, in causes transferred to the circuit court, should at once become the orders, judgments, and decrees of that court, and might be enforced, pleaded, and proved accordingly.

The question involved in this case was, whether the establishment by the President of a provisional court was warranted by the Constitution. Upon that question, CHASE, C. J., speaking for the court, says, "That the late rebellion, when it assumed the character of civil war, was attended by the general incidents of a regular war, has been so frequently declared here, that nothing further need be said on that point.

"The object of the national government, indeed, was neither conquest nor subjugation, but the overthrow of the insurgent organization, the suppression of insurrection, and the re-establishment of legitimate authority. But in the attainment of these ends, through military force, it became the duty of the national government, wherever the insurgent power was overthrown, and the territory which had been dominated by it was occupied by the national forces, to provide, as far as possible, so long as the war continued, for the security of persons and property, and for the administration of justice.

"The duty of the national government, in this respect, was no other than that which devolves upon the government of a regular belligerent, occupying, during war, the territory of another belligerent. It was a military duty, to be performed by the President as commander-in-chief, intrusted as such with the direction of the military force by which the occupation was held.

"What that duty is, when the territory occupied by the

national forces is foreign territory, has been declared by this court in several cases arising from such occupation during the late war with Mexico. In the case of *Leitensdorfer* v. *Webb*, 20 How. 176, the authority of the officer holding possession for the United States to establish a provisional government was sustained; and the reasons by which that judgment was supported apply directly to the establishment of the provisional court in Louisiana. The cases of *Jecker* v. *Montgomery*, 13 *Id.* 498, and 18 *Id.* 110, and *Cross* v. *Harrison*, 16 *Id.* 164, may also be cited in illustration of the principles applicable to military occupation.

"We have no doubt that the provisional court of Louisiana was properly established by the President, in the exercise of his constitutional authority during war; or that Congress had power, upon the close of the war, and the dissolution of the provisional court, to provide for the transfer of cases pending in that court, and of its judgments and decrees, to the proper courts of the United States."

It has been claimed that the establishment of the provisional court was conclusive evidence that civil authority had been restored, and that this restored the plaintiff to all the rights and privileges of a citizen of the United States; but an examination of the above decision will conclusively demonstrate that this position is wholly unfounded. By the proclamation, the court was only to exist during the continuance of the war. The court say, that it was the duty of the government as far as possible to provide for "the security of persons and property and for the administration of justice so long as the war continued." The constitutionality of the court was sustained, not on the ground that the war had ceased, that peace had been restored, that civil authority and the courts had been re-established, and that the citizens of that state had ceased to be enemies of the United States and the inhabitants of the adhering states, but upon the ground that it was a military duty, to be performed by "a regular belligerent occupying during war the territory of another belligerent." The court expressly say, that "the duty of the

National government, in this respect, was no other than that which devolves upon the government of a regular belligerent occupying, during war, the territoy of another belligerent. It was a military duty to be performed by the President as commander-in-chief, and entrusted as such with the direction of the military force by which the occupation was held."

In another part of opinion it is said, "We have no doubt that the provisional court of Louisiana was properly established by the President in the exercise of his constitutional authority during war." The existence of war, of belligerent rights and constitutional authority of the President during war, are the grounds upon which the provisional court was sustained and upheld. If this be true, how can it be maintained that the war had ceased so far as New Orleans was concerned, that her inhabitants had ceased to be enemies and had been restored to the rights and privileges of citizens of the United States as they existed prior and subsequent to the war? The position is wholly untenable, and cannot be sustained either on principle or by authority.

The foregoing authorities clearly establish the following propositions. First, that the war making power is, by the constitution, vested in Congress, and that the President has no power to declare war or conclude peace, except as he may be empowered by Congress. Second, that the existence of war and the restoration of peace are to be determined by the political department of the government, and that such determination is binding and conclusive upon the courts, and deprives the courts of the power of hearing proof and determining as a question of fact either that war exists or has ceased to exist. Third, that the courts will take judicial notice of the existence of war or the restoration of peace when proclaimed by the President. Fourth, that the late rebellion did not become a civil war and was not governed by the rules of war, until the 16th of August, 1861, when the President issued his proclamation under and in pursuance of the act of Congress of July 13th, 1861. Fifth, that civil war is governed

by the same rules as a foreign war, and that the legal consequences are the same. Sixth, that the proclamation of the President placed all the inhabitants of the State of Louisiana in a state of insurrection, made them the enemies of the United States and the inhabitants of the adhering states, and rendered all commercial intercourse unlawful, except such as might be carried on under and by virtue of a special license and permit of the President under the rules and regulations prescribed by the Secretary of the Treasury. Seventh, that all contracts made during the war by belligerents, and not licensed and permitted by the President, were absolutely void. Eighth, that contracts made prior to the war were suspended during the existence of such war; that the remedy upon such contracts was suspended until the restoration of peace, when the debt and the remedy revived. Ninth, that during the existence of the war an inhabitant of a state in rebellion had no right to institute or maintain any suit in any court in the adhering states, and that, consequently, the statute of limitations did not run against such person during the existence of the war. Tenth, that the only legal effect of the occupation of the city of New Orleans was to authorize the President to exercise the discretionary power vested in him by the proviso to the 5th section of act of Congress of July 13th, 1861; that by said act of Congress the President was authorized to license and permit limited commercial intercourse; that such persons as had a license and permit from the President might lawfully trade; that such license and permit did not confer any right beyond that of trading; that no citizen of the State of Louisiana had the lawful right to carry on commercial intercourse without he had a license and permit from the President issued in strict conformity to the rules and regulations prescribed by the Secretary of the Treasury; that such occupation did not restore peace or release the inhabitants thereof from the legal consequences of their alienage and enmity, or give them a personal standing in our courts. Eleventh, that the plaintiff, being an inhabitant of the State of Lousiana during the

war, was the enemy of all the inhabitants of Indiana, and consequently had no right during the existence of the war to institute and maintain an action on the contract sued on. Twelfth, that while the courts will take judicial notice that all the inhabitants of the State of Louisiana were in insurrection, they will not take judicial notice that any of such inhabitants maintained a loyal adhesion to the union and constitution, or that any part of said state was occupied and controlled by the forces of the United States engaged in the dispersion of the insurgents, or that any particular person had a license or permit from the President to carry on commercial intercourse, but that a party relying upon such facts must allege and prove them. Thirteenth, that while actual hostilities ceased in April, 1865, peace with its legal consequences was not restored until the 20th of August, 1866, when the President issued his proclamation proclaiming that peace existed throughout the land. Fourteenth, that no part of the account sued on was created during the existence of civil war, and when commercial intercourse was unlawful. Fifteenth, that the time that intervened between the 16th, of August, 1861, and the 20th of August, 1866, is not to be included in determining whether this action is barred by the statute of limitations, and that excluding such time the action is not barred. Sixteenth, that when a statute of limitations contains no exceptions, and it appears upon the face of the complaint that the action is barred, the question can be raised by demurrer, but where there are exceptions, the statute must be pleaded, so as to give the plaintiff the opportunity of replying the facts that will bring it within the exception. Seventeenth, the conclusions that we have reached in this case render it unnecessary to examine the question of whether this action was taken out of the operation of the statute of limitations by a new promise or acknowledgment, further than to say that when the letter relied on was written, war existed, which rendered the parties enemies, and made all contracts entered into between them absolutely void.

The judgment is affirmed, with costs.

B. E Rhoads and *M. G. Rhoads*, for appellant.

J. M. Allen, *J. B. Cheadle*, *J. E. McDonald*, *A. L. Roache*, and *E. M. McDonald*, for appellee.

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LOWRY and Another v. HOWARD and Another.

FRAUDULENT CONVEYANCE.—Where at the time of the conveyance of certain real estate, a writ of attachment against the property of the grantor was in the hands of the sheriff, of the issuing of which the grantee had no knowledge, which writ was never levied, the attachment proceeding being afterwards dismissed;

Held, that the conveyance was not rendered fraudulent by the attachment proceeding.

CONVEYANCE.—*Consideration.*—If there is in reality a valuable and sufficient consideration for a conveyance, it is immaterial whether the amount is specified in the deed or not.

SAME.—Where it is charged that a conveyance is fraudulent, the nature and amount of the consideration are important with reference to the good faith of the transaction.

SAME.—*Suit Pending.*—The fact that a suit is pending against a party does not prevent him from conveying his lands, if he does it in good faith.

SAME.—A person in embarrassed circumstances, but capable of contracting, may sell his property for the purpose of discharging his debts, for such consideration as he may agree to accept; and if there be nothing illegal in the transaction, it will stand as against his creditors.

APPEAL from the Madison Circuit Court.

DOWNEY, C. J.—This action was brought by the appellants against the appellees to set aside a deed for certain real estate made by Howard to his co-defendant, Joseph Sigler, and which it is alleged was made by the grantor, and received by the grantee, to cheat, hinder, delay, and defraud the appellants in the collection of a debt due them from Howard and others. The complaint alleges the recovery of a judgment by the plaintiffs against Howard, Andrew J. Sigler, and Francis Sigler, in the common pleas, on the 22d day of May, 1866, a levy on the property in question by virtue of an ex-

ecution issued on that judgment, and an ineffectual offer to sell; that the land will not sell on account of a previous deed therefor having been made by Howard to Joseph Sigler, which it prays to have declared void and set aside.

There was an answer by general denial; trial by the court; finding for the defendants; motion for a new trial overruled; and judgment on the finding.

The only question in the case relates to the refusal of the court to grant a new trial, and this involves the sufficiency of the evidence to sustain the finding of the court.

Howard was a member of the firm of Howard, Sigler & Co. Joseph Sigler was not a member of that firm, but was their security for some two thousand five hundred dollars.

When the plaintiffs sued the firm of Howard, Sigler & Co., they took out an attachment, but never had it levied, and it was eventually dismissed. They had been negotiating with Howard for the purchase of the property in question in payment of their claims against the firm. During the pendency of these negotiations, the nature of which was unknown to Joseph Sigler, and while the attachment was out, April 17th, 1866, the land was conveyed by Howard to Joseph Sigler, on account of his liability as security for the said firm, he agreeing to pay the debt for which he was liable, and certain other debts of the firm, amounting in all to five thousand five hundred dollars, the value of the land.

Joseph Sigler knew that the firm of Howard, Sigler & Co. was embarrassed when he took the deed, and his purpose was to save himself from losing the amount for which he was security.

The attachment became a lien on the property from the time when it was delivered to the sheriff, which was on the 17th day of April, 1866. 2 G. & H. 142, sec. 165. Had the plaintiffs followed up the proceeding in attachment, by having the writ levied, and having an order, in connection with their judgment, for the sale of the attached property, they might then have reaped the fruits of their acquired lien; but instead of doing this, they abandoned their lien, by ordering the

sheriff not to levy the attachment, and by dismissing it. Under these circumstances, we do not see how the fact that an attachment was in the hands of the sheriff, can affect the defendant Sigler, unless it might show that he took the deed in bad faith. But this cannot be, because it does not appear that he knew, when he took his deed, that the attachment had been issued. He testifies that he knew that the plaintiffs were trying to secure their claim, but did not know how they were attempting to do so. When the deed was signed and acknowledged, the exact amount of the debts which the grantee was to pay was not known to the grantor, and that amount was inserted when the deed was delivered on the next day. As there was in reality a valuable and sufficient consideration, it was immaterial whether the amount of it was specified in the deed or not. *Heavilon* v. *Heavilon*, 29 Ind. 509. Between the parties, the deed was valid without any consideration. *Randall* v. *Ghent*, 19 Ind. 271. But in this case, the nature and amount of the consideration are important, with reference to the *bona fides* of the transaction.

The fact that a suit is pending against a party does not prevent him from conveying his land, if it be done in good faith. *McMahan* v. *Morrison*, 16 Ind. 172. But it is otherwise if it be in bad faith, although a full consideration be paid. *Rogers* v. *Evans*, 3 Ind. 574.

A person in embarrassed circumstances, but capable of contracting, may sell his property for the purpose of discharging his debts, for such consideration as he may agree to accept, and if there be nothing illegal in the transaction, it will stand as against his creditors. *Hubbs* v. *Bancroft*, 4 Ind. 388; *Frank* v. *Peters*, 9 Ind. 343.

We regard this as a case where one creditor has, by superior diligence, tact, or persistence, secured a preference over another. We find no evidence, as against Joseph Sigler, of any secret trust or of any fraud. The court having decided the case in favor of the validity of the deed, we cannot say that any error was committed. See *Stewart* v. *English*, 6 Ind. 176, a case much like this.

The judgment is affirmed, with costs.

W. S. Ballenger, for appellants.

J. Davis, *E. B. Goodykoontz*, and *J. A. Harrison*, for appellees.

THE OHIO AND MISSISSIPPI R. R. CO. *v.* HAYS.

PRACTICE.—*Special Finding.*—Where there is a special finding of facts by the court, without any conclusions of law being found, and with no exception entered to the decision, in accordance with section 341 of the code, no question can be raised upon the finding as a special finding under said section 341.

DAMAGES.—*Railroad.—Injury to Animals.*—The owner of an animal killed by a locomotive, at a point on a railroad where the road is not fenced, may abandon the animal, and the railroad company will be liable for the value of the animal when injured.

APPEAL from the Dearborn Circuit Court.

BUSKIRK, J.—There is presented by the record in this cause but one question for the decision of this court. The appellee sued the appellant before a justice of the peace for the value of a cow alleged to have been killed by the locomotive and train of the defendant, at a point on the said road where the same was not fenced. The cause was tried by the justice, and resulted in a judgment for the plaintiff in the sum of fifty dollars. The appellant appealed the case to the circuit court, where the cause was, by the agreement of the parties, tried by the court. The court made a special finding of the facts, but no conclusions of law were found, and no exception to the decision of the court was taken in accordance with section 341 of the code. There was a motion for a new trial, which was overruled, and an exception taken. The question sought to be raised by the appellant does not properly arise on the special findings of the court upon questions of fact, for the reason that the court found no conclusions of law, and there was no exception to the decision of the court. This court has repeatedly held that this was necessary. The question discussed by the counsel of appellant is probably presented by overruling the motion for a new

trial. The court found, in accordance with the evidence, that the plaintiff's cow was injured by the engine of appellant; that she lingered for four or five days, when she died from the injuries received; that the cow when injured was of the value of fifty dollars; and that the value after having been so injured was five dollars. The court rendered a judgment for fifty dollars. The appellant moved the court to render judgment for forty-five dollars and the costs in the circuit court. This motion was overruled. One of the reasons for a new trial is, that the judgment was excessive, being for fifty dollars, when it should have been for forty-five dollars.

The position of the appellant is, that the owner of an animal killed by the engines and trains of a railroad cannot abandon the animal and hold the company liable for the value thereof just prior to the injury, but that he is bound to make any use of such animal that can be done, and that if he fails to do so, the company has the right to deduct from the value of the animal the value of the carcass after its death.

The statute provides that the court shall give judgment for the value of the animal or animals killed or the injury done. The meaning of this language would plainly seem to be, that when the animal is killed its value at the time the injury was inflicted shall be paid, but when the animal is only injured then the damage done is to be the amount of the recovery. This view is strengthened by reference to the second section of the act, the language being, when any animals have been killed or injured. This is no longer an open question in this court. In the case of *The Indianapolis, &c., R. R. Co.* v. *Mustard*, 34 Ind. 50, this court held that the owner of an animal killed had the right to abandon it, and that the company was liable for the value of the animal when injured. The court committed no error in overruling the motion for a new trial.

The judgment is affirmed, with five per cent. damages and costs.

T. Gazlay, G. B. Fitch, and *J. Schwartz*, for appellant.

F. Adkinson, for appellee.

JONES and Others v. COOK.

PLEADING.—*Complaint.*—Complaint by A. against B., alleging that A. sold and delivered to B. a certain quantity of wheat, on the 31st day of August, 1867, and B. agreed to pay A. within twelve cents per bushel of the Cincinnati market price, to be determined by the Cincinnati papers at any time which A. might select, within one year from the delivery of the wheat; that on the 28th day of April, 1868, A. notified B. that he would on that day take the price of said wheat as per Cincinnati papers of that date; that wheat was worth in Cincinnati on that day $2.70 per bushel; and that A. fixed the price on that day and demanded the pay therefor, but B. refused, &c.

Held, that the complaint was good.

APPEAL from the Bartholomew Circuit Court.

PETTIT, J.—The appellee sued the appellants. The complaint was in two paragraphs, the first of which was as follows:

"The plaintiff complains of the defendants, and says that on the 3d day of August, 1867, he sold and delivered to said defendants one thousand two hundred twenty-three bushels and twenty-one pounds of wheat, for which defendants agreed before said delivery, and as the contract under which the same was delivered, to pay plaintiff within twelve cents of the Cincinnati market price, to be determined by the Cincinnati papers, at any time within one year from the date of delivery of said wheat, which plaintiff might select; that under said contract plaintiff delivered and defendants accepted said quantity of wheat under said contract; that on the 28th day of April, 1868, the plaintiff called upon defendants and notified them that he would on that day take the price of said wheat as per Cincinnati papers of that date, and that he fixed the price on that day; that on said day wheat was worth in the city of Cincinnati two dollars and seventy cents per bushel; that plaintiff then and there fixed the price of his wheat, and demanded the pay therefor, but defendants refused, and neglected to pay for the same or any part thereof."

The second paragraph was a common count for wheat

sold and delivered, and closed by asking judgment for six thousand dollars. There was a motion to strike out certain parts of the first paragraph of the complaint, which was properly overruled. A demurrer was filed to the same paragraph, because it did not state facts sufficient, &c., and this was properly overruled. Both rulings were excepted to. Answers of general denial and payment. Payment was replied to by denial. Trial by jury, and verdict for plaintiff for three thousand two hundred and sixty-two dollars and twenty-six cents. A motion for a new trial was overruled; exceptions, and judgment on the verdict. The evidence is in the record, and fully sustains the first paragraph of the complaint and the verdict. It is objected that the verdict is for more than two dollars and fifty-eight cents a bushel (being twelve cents less than the Cincinnati price). Admit it. There had been an unreasonable delay in payment, of one year and eight months, and the jury added interest on the amount due. The sixth instruction will explain this. The instructions are:

"1. This is a civil action, and is to be determined and dedecided by the weight or preponderance of the evidence.

"2. The burden of proof in this case is upon the plaintiff, and to entitle him to a verdict, he must show to your satisfaction by a preponderance of the evidence the material allegations of his complaint.

"3. If you are satisfied from the evidence that the wheat was delivered and received upon the contract set up in the first paragraph in the complaint, and that the plaintiff notitified the defendants or either of them, that he would fix the price on a particular day, and did so fix it, then the rule of damages is the price of the wheat on that day at Cincinnati, as shown by the papers, less twelve cents per bushel.

"4. If you are satisfied from the evidence that the wheat was not delivered upon the special contract, or that the plaintiff did not fix the price upon a particular day up to the time of the commencement of this action, he is not entitled to a verdict upon the first paragraph of the complaint.

"5. If you find for the defendants on the first paragraph

of the complaint, and that the plaintiff delivered to the defendants one thousand two hundred and twenty-three bushels of wheat on or about August, 1867, the rule of damages is the price of the wheat at the time of delivery.

"6. When payment has been unreasonably delayed for goods sold and delivered, the plaintiff is entitled to interest at the rate of six per cent. per annum; it is for you to determine whether payment has been unreasonably delayed or not, and if so delayed, for how long."

The giving these instructions was excepted to, and is assigned for error. They were clearly and fully appropriate to the complaint and the evidence, and we can come to no other conclusion than that this case was brought here for delay (as is suggested in the evidence that it would be if the suit should be brought); and we feel it our duty, as we are satisfied that no wrong was committed by the court below, to affirm the judgment with two per cent damages and costs, which is done accordingly.

F. T. Hord, for appellants.

CHURCH and Others *v.* THE TOWN OF KNIGHTSTOWN. 35 177 / 150 571

TOWN.—*Annexing Territory.—Appeal.*—The action of the board of county commissioners in annexing contiguous territory, not platted or recorded, to a town, is final, and no appeal lies therefrom.

APPEAL from the Henry Circuit Court.

DOWNEY, C. J.—This was a proceeding instituted before the board of commissioners of Henry county, for the annexation of contiguous territory, not platted or recorded, to the town of Knightstown, under sections 51 and 52, 1 G. & H. 630.

The commissioners ordered the annexation, and the ob-

jectors appealed to the circuit court, where there was a similar result. They now appeal to this court.

We have decided, at the present term of this court, in the case of the *Trustees of the Town of Princeton* v. *Manck, ante*, p. 51, that there is no appeal from the action of the commissioners in such a case, and that their action is final.

The judgment is reversed, with costs, and the cause remanded to the circuit court, with instructions to dismiss the appeal.

J. H. Mellett and *M. E. Forkner*, for appellants.

S. E. Perkins and *S. E. Perkins, Jr.*, for appellee.

PARTLOW *v.* HAGGARTY.

VICIOUS ANIMAL.—Whoever keeps an animal accustomed to attack or bite mankind, with knowledge of its dangerous propensities, is *prima facie* liable to an action for damages at the suit of any person attacked or injured by the animal, without proof of any negligence or fault in the securing or taking care of it. The gist of the action is the keeping of the animal after knowledge of its mischievous disposition.

SAME.—*Complaint.*—Suit to recover for injuries received from being bitten and otherwise injured by a dog. The complaint alleged that the defendant kept the dog, and negligently suffered him to go at large, and that he attacked and bit the plaintiff, without her fault, and greatly lacerated and injured her, &c., and that the defendant had knowledge of the fact that the dog was accustomed to commit such injuries; wherefore, &c.

Held, that the complaint was good.

APPEAL from the Hamilton Circuit Court.

DOWNEY, C. J.—The appellee, by her next friend, sued the appellant for injuries received from being bitten and otherwise injured by a dog kept by the appellant, and which, it was alleged, the appellant knew was accustomed to attack and bite mankind. A demurrer to the complaint on the ground that the same did not state facts sufficient to consti-

tute a cause of action, was overruled; and this is the first alleged error. The complaint alleges that the defendant wrongfully kept the dog, and negligently suffered him to go at large; that he attacked and bit the plaintiff, without her fault, and greatly lacerated, hurt, bruised, and wounded one of her ankles, by means of which she became dangerously sick, sore, and lame, and suffered and underwent great pain, and incurred great expense. It also alleges knowledge on the part of the defendant, of the fact that the dog was accustomed to commit such injuries, and concludes with a demand for two thousand dollars damages. We think the demurrer to the complaint was properly overruled.

Upon an issue formed by a general denial of the complaint, there was a trial by jury, and a verdict for the plaintiff for two hundred dollars. A motion was made by the defendant for a new trial, for the reasons that the verdict was contrary to law, not sustained by the evidence, and because the court refused to give certain charges to the jury asked by the defendant. This motion was overruled, exception entered, and final judgment rendered for the plaintiff, for the amount of the verdict.

The overruling of the motion for a new trial is the only other error assigned.

The evidence abundantly shows that the defendant knew of the vicious disposition of the dog, and that he had bitten one or more other persons. The defendant had frequently found it necessary to interpose when persons came upon the premises, to prevent the attacks of the dog. The dog was kept at some times chained fast to some fixed object, and at other times the chain was fastened to a piece of wood, which he dragged about with him. On the occasion in question, the defendant was not at home, and his wife had shortly before turned the dog loose. The plaintiff, a little girl, having gone to the house, was assisting the defendant's children, at the request of the wife of the defendant, to catch some chickens. The dog, as she testifies, ran against her, knocked her down, tore her clothes, tried to catch her by the throat,

bit her ankle, leg, and other parts of her person, so that she was confined to her bed from that time, the 6th of September, 1869, to the 18th day of December, 1869. There was no evidence materially modifying the testimony of the plaintiff.

The court was requested by the defendant to instruct the jury that if the defendant was not present when the biting occurred, and had a short time before left the dog securely fastened with a chain, and some one, without the knowledge of the defendant, turned him loose, shortly before the biting, then the defendant was not liable, whether the dog was vicious or not. Also, that the defendant was not liable for any carelessness that his wife may have been guilty of in turning the dog loose, in his absence, without his direction; and that if the injury was the result of such carelessness of the wife, the jury should find for the defendant.

The court refused these instructions, and the point was properly reserved.

We think these instructions were correctly refused. Whoever keeps an animal accustomed to attack or bite mankind, with knowledge of its dangerous propensities, is *prima facie* liable to an action for damages at the suit of any person attacked or injured by the animal, without proof of any negligence or fault in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous disposition. Addison on Torts, 184. It was the duty of the defendant to see to it that so dangerous an animal was left in safe hands.

The judgment is affirmed, with ten per cent. damages and costs.

J. W. Evans, for appellant.

SIMS and Others v. RICKETS.

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HUSBAND AND WIFE.—None of the disabilities imposed upon married women have attached to the condition of a married man, who is as free to receive the title to property, and dispose of it, after marriage as before, except that he cannot by his conveyance affect the inchoate right of his wife to his real estate.

SAME.—*Conveyance by Husband to Wife.*—A conveyance from a husband to his wife, without the intervention of a trustee, is void at law.

SAME.—*Equity.*—A direct conveyance from a husband to his wife will be sustained and upheld in equity in either of the following cases, namely: first, where the consideration of the transfer is a separate interest of the wife yielded up by her for the husband's benefit, or that of their family, or which has been appropriated by him to his uses; second, where the husband is in a situation to make a gift to his wife, and distinctly separates the property given from the mass of his property, and sets it apart to the separate, sole, and exclusive use of his wife.

SAME.—Where a wife advances money to her husband, or the husband is indebted to the wife upon any valid consideration, the wife stands as the creditor of her husband, and if a conveyance is made to pay or secure such liability, the wife will hold the property free from the claims of other creditors, where the transaction is unaffected by unfairness or fraud.

SAME.—*Contract between Husband and Wife.*—Whenever a contract would be good at law if made by a husband with trustees for his wife, that contract will be sustained in equity, when made by the husband and wife without the intervention of trustees.

SAME.—*Conveyance to Wife.*—Prior to the recent legislation in this State authorizing married women to hold real estate to their separate use, when a conveyance was made by a stranger to a married woman or to a trustee for her, it was necessary, in order to give her a separate use in the property, that such conveyance should contain words clearly indicating such intention, but such words were unnecessary in a conveyance from a husband to his wife, for the law presumed that it was intended for her separate and exclusive use.

SAME.—*Statute.*—Section 5 of the act entitled "an act touching the marriage relation and liabilities incident thereto" (approved May 31st, 1852), makes all lands held by a married woman at the time of her marriage, or acquired by her subsequently, hers absolutely, and enables her to use, enjoy, and control the same independently of her husband, and as her separate property; and since the passage of that act a conveyance of land to a married woman need not contain words indicating that she is to hold the property to her separate use.

SAME.—*Conveyance to Wife.*—Conveyances from a husband to his wife are not sustained in equity, if there is some feature in them impeaching their fairness and certainty, as that they are not in the nature of a provision for the wife, or where they interfere with the rights of creditors, or when the property given or granted is not distinctly separated from the mass of the husband's property.

SAME.—*Husband.*—In consequence of the absolute power which a man posses over his own property, he may make any disposition of it which does not interfere with the existing rights of others.

SAME.—*Provision for Wife.*—When a husband is free from debt, and has no children, and conveys property, to his wife for a nominal consideration, the law will presume that it was intended as a provision for his wife.

SAME.—A conveyance from a husband to his wife which is good in equity vests the title to the property conveyed in the wife as fully, completely, and absolutely as though the deed had been made by a stranger upon a valuable consideration moving from the wife.

APPEAL from the Howard Circuit Court.

BUSKIRK, J.—This action is founded on two written instruments; one, a deed of conveyance of the real estate in controversy; and two, a will subsequently made by the grantor in the deed. The material facts charged in the complaint are these: That Clement G. Rickets, being the absolute owner in fee of the premises described in the complaint, on the 12th day of January, 1856, by a general warranty deed, conveyed the said premises, in fee, directly to Mary Rickets, who was then his wife; that the said Rickets on the 8th day of May, 1856, made his last will and testament, and that on the 17th of the same month, he added a codicil thereto; that by the said will he bequeathed to his wife certain personal property therein described, and an annuity of three hundred and sixty-five dollars, payable semi-annually, and directed that the sum of six thousand and eighty-three dollars and thirty-three cents should be invested by his executor for the purpose of raising such legacy; that in the event the said annuity should prove insufficient for the comfortable maintenance of his wife during sickness or ill health, his executor was directed and authorized to invest such other sum as, in his discretion, should be necessary for that purpose, and to pay her the interest of said sum whenever, in his dis-

cretion, her necessities might require it; that by the codicil to the said will, the executor was directed to pay his widow, as soon after his decease as should be convenient, the further and additional sum of one thousand dollars, with interest thereon, from the date of his death to the time of the payment, which money was to be used by her in purchasing for herself a private residence; that the said will, after making certain specific legacies to his brothers and sisters, contained the following clause, namely: "Fifth. I give and bequeath all the rest, residue, and remainder of my estate, real, personal and mixed, to be equally divided between my brothers and sisters, or their heirs, except Letitia; that is to say, the said residue is to be divided into eight equal parts, and one part thereof I give and bequeath unto the children of my deceased sister, Sarah Courtright;" then follow the names of seven of his brothers and sisters, to whom or to whose heirs where they are dead, he gives and bequeaths one equal eighth part of the residue of his estate, in the same language in which he gives and bequeaths to the children of his deceased sister Sarah, except as to the names; that by the sixth clause of his will he authorized and empowered his executor to sign, seal, execute, and acknowledge all such deeds of conveyance as might be necessary to the granting and conveying to the purchaser or purchasers of all such lands as he might contract for the sale of in his lifetime; that it was further provided by the said will that upon the death of the said Mary Rickets, the sums which he had directed to be invested to raise the legacies for her should be divided in the same manner, and paid as is directed in the fifth clause of his will, in which he had disposed of the residue of his estate; that the said Clement G. Rickets departed this life on the 22d day of March, 1858, in Columbia county, Pennsylvania, leaving surviving him the said Mary Rickets, as his widow, but leaving no child, father, or mother him surviving; that the deed of conveyance from the said Rickets to his wife Mary, was recorded in the recorder's office of Howard county, in the State of Indiana, where the lands conveyed

are situated, on the 12th day of May, 1858; that the said deed was executed in Columbia county, in the State of Pennsylvania, and the consideration expressed therein was the sum of one dollar; that the said Mary Rickets has, from the date of the said deed of conveyance, had and held the same, and that since the death of the said testator she has exercised and still exercises absolute control of the said premises, and pretends and claims to be the absolute owner thereof; that the plaintiffs are the brothers and sisters, and the descendants of such as are dead, of the testator, and are the persons referred to and named in the residuary clause of the said will; that the deed of conveyance is absolutely void, by reason of the fact that when the same was made, the grantor and grantee were husband and wife; that the said deed being void, no title passed to the said Mary Rickets; and that the title to the said premises remained in the said Clement G. Rickets until his death, when the title thereto became and was vested in the plaintiffs, under and by virtue of the residuary clause of the said will. The prayer of the complaint was, that the said deed of conveyance from the said Clement G. Rickets to the said Mary Rickets be set aside and canceled, and that the plaintiffs recover the possession of the said premises, and one thousand dollars damages for the use and occupation thereof. Copies of the deed and will were filed with, and constitute parts of, the complaint. The appellee demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the plaintiffs refusing to amend, the court rendered judgment for the defendant. Proper exceptions were taken to these several rulings, and the only error assigned here is upon the action of the court in sustaining the demurrer to the complaint.

It is quite obvious that if the deed is valid and conveyed an estate in fee simple, absolute and unconditional, to the grantee therein named, the grantor could have no power to make a subsequent bequest of the same premises, he having already parted with his title thereto by deed; and

that, therefore, if the deed set out in the complaint be a valid one, the appellants who claim title to the premises by virtue of the will of Clement G. Rickets, who was the grantor in the said deed, can have no valid title to the said premises.

The validity of the deed is, therefore, the real question in the case. The appellants claim that the deed was absolutely void, for the reason that it was made by a husband directly to his wife, without the intervention of a trustee. The appellee admits that the deed is void at law, but maintains that it will be upheld and sustained in equity.

The adjudicated cases in this court do not very clearly define when and in what cases equity will sustain a conveyance direct from husband to wife. This court, in *Bunch* v. *Bunch*, 26 Ind. 400, say, "The deed to the land in question, executed by the defendant to the plaintiff, during their coverture, was void in law. This is not questioned by the plaintiff's counsel; indeed, the complaint praying that the title may be vested and quieted in her is based on the assumption that the deed is void at law, and appeals to the equity powers of the court for its confirmation. Such conveyances, though void at law, are sometimes upheld and confirmed by courts of equity. The confirmation of such contracts is not a right to be enforced in all cases. Such claims are addressed to the sound discretion of the court, and are only confirmed after a most cautious examination, in clear cases, where such confirmation is demanded by the clearest dictates of right and justice."

We have made a very careful examination of the elementary works and decisions bearing upon this question. The decisions are not uniform and consistent with each other. It is important that some fixed and definite rules should be established, by which we are to be governed in the decision of such cases, as it is not safe to leave such questions to the mere discretion of the court, for in such case, the peculiar views or prejudices of the judge would determine the rights of parties. According to the strict rules of the old common law, the wife was not permitted to take and enjoy either

real or personal property, independent of her husband. These rules were modified by the courts of equity, and have recently been abolished by statute in this State. It is now the settled law in this State, and in the most of the states of the Union, that a wife may take, hold, and enjoy to her sole, separate, and exclusive use, both real and personal property, and in this State she may encumber and alienate her separate real estate by her husband joining with her in the mortgage or deed. There is now no limitation upon the power of the wife to take and hold real estate by inheritance, devise, or purchase. The limitation is upon her power of alienation. This she cannot do, unless her husband joins with her in the conveyance. It is also the admitted doctrine in this State, that a married woman may contract in reference to her separate property, and while she may not create a personal liability, she may charge her seperate property for a debt contracted in reference thereto. The disabilities imposed upon married women by the common law have been, to a great extent, removed by the principles of equity and the statutes passed to secure their rights. Even after the doctrine was established, that a married woman might hold real estate to her separate and exclusive use, the rule was inflexible at common law, that she could acquire no valid title by a conveyance direct from her husband; but the courts of equity have modified the harshness of that rule. The rule that a wife could make no valid contract or agreement with her husband, was based upon the same principle as the rule that she could not hold real estate to her separate and exclusive use independent of her husband. Both of these rules were established in consequence of the unity of person between husband and wife. The legislation of this State has destroyed the unity in person between husband and wife so far as their rights of property are concerned. The strictness and rigor of these old rules should be modified, so as to conform them to the now well settled rights of property between husband and wife.

STORY says, it was formerly supposed that the interposition

of trustees was, in all arrangements of this sort, whether made before or after marriage, indispensable for the protection of the wife's rights and interests. In other words, it was deemed absolutely necessary that the property, of which the wife was to have the separate and exclusive use, should be vested in trustees for her benefit, and that the agreement of the husband should be made with such trustees, or, at least, with persons capable of contracting with him for her benefit. But although, in strict propriety, that should always be done, and it is usually done in regular and well considered settlements, yet it has for more than a century been established in courts of equity, that the intervention of trustees is not indispensable, and that whenever real or personal property is given, or devised, or settled upon a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties shall be effectuated in equity, and the wife's interest protected against the marital rights and claims of her husband and of his creditors also. 2 Story Eq. 600, 601, sec. 1380.

In *Sexton* v. *Wheaton*, 8 Wheat. 229, where the validity of a postnuptial voluntary settlement made by a husband upon his wife was in question, MARSHALL, C. J., says:

"It would seem to be a consequence of that absolute power which a man posseses over his own property that he may make any disposition of it which does not interfere with the existing rights of others, and such disposition of it, if it be fair and real, will be valid." Speaking of the case before him, he says: "The appellant contends that the house and lot contained in this deed constituted the bulk of Joseph Wheaton's estate, and that the conveyance ought on that account to be deemed fraudulent. * * * If a man entirely unincumbered has a right to make a voluntary settlement of a part of his estate, it is difficult to say how much of it he may settle."

The doctrine is thus stated by the Supreme Court of the United States in *Wallingsford* v. *Allen*, 10 Pet. 583:

"Agreements between husband and wife, during coverture,

for the transfer from him of property directly to the latter, are undoubtedly void at law. Equity examines with great caution before it will confirm them. But it does sustain them when a clear and satisfactory case is made out that the property is to be applied to the separate use of the wife. Where the consideration of the transfer is a separate interest of the wife, yielded up by her for the husband's benefit, or that of their family, or which has been appropriated by him to his uses; where the husband is in a situation to make a gift of property to the wife, and distinctly separates it from the mass of his property for her use—either case equity will sustain, though no trustee has been interposed to hold for the wife's use. In *More* v. *Freeman*, Bunb. 205, it was determined that articles of agreement between husband and wife are binding in equity, without the intervention of a trustee. Other cases may be cited to the same purpose. In regard to grants from the husband to the wife, an examination of the cases in the books will show that when they have not been sustained in equity, it has been on account of some feature in them impeaching their fairness and certainty, as that they were not in the nature of a provision for the wife, or when they interfered with the rights of a creditor, or when the property given or granted had not been distinctly separated from the mass of the husband's property."

In *Putnam* v. *Bicknell*, 18 Wis. 333, it is said: "Though void at law, an absolute conveyance of real or personal property from the husband directly to his wife is good in equity, and sufficient, so far as the form is concerned, to divest the husband of such property, and to vest the same in the wife, as against all persons save the creditors of the husband, especially when the transfer is fairly made, upon a meritorious or valuable consideration."

In *Huber* v. *Huber*, 10 Ohio, 371, it was held "that a husband may, during his life, settle a separate estate upon his wife, that is, he may (there being no claims of creditors to forbid it) transfer property to his wife in which she never had any beneficial interest, and which will enure to her as her

separate estate. This may be done even without the intervention of a trustee. A court of equity would, if necessary, appoint one to execute the intentions of the husband."

In *Simmons* v. *McElwain*, 26 Barb. 419, it is said: "It is true that the deed from the defendant to his wife was void in law, for a husband cannot, during coverture, make a grant or conveyance to his wife. But such a grant will be upheld in equity, when it is necessary to prevent injustice."

In *Wilder* v. *Brooks*, 10 Minn. 50, it is said: "And had the conveyance been made to any person other than his wife, and even for a merely nominal consideration, we see no reason why it would not have been completely unassailable. If these premises are sound, it follows that if the instrument was effectual between Andrew M. Torbet and his wife to pass the property, it was good as to the world, and *vice versa*.

Again it is said: "Contracts of all kinds, between husband and wife, are objected to, not only because they are inconsistent with the common law doctrine that the parties are one person in law, but because they introduce the disturbing influences of bargain and sale into the marriage relation, and induce a separation rather than a unity of interests. But certainly neither in reason nor on principle can it be contended that so far as this objection is concerned, there is any difference between the cases of a conveyance by a husband to trustees for the use of a wife or to a third person who conveys to the wife, or to the wife directly. Each of these would have precisely the same effect, in conferring upon the wife property and interest independent of and separate from her husband. And the tendency of modern legislation, as well of judicial interpretation, is to improve and liberalize the marital relation by recognizing and upholding the reasonable rights of both parties to the matrimonial contract."

The law is thus stated by the Supreme Court of Mass., in the case of *Whitten* v. *Whitten*, 3 Cush. 191: "The like presumption exists in the case of purchase in the name of his wife, and of securities taken in her name. Indeed, Mr. Justice STORY says, that the presumption is stronger in the

case of a wife, than in that of a child. It is, therefore, an established doctrine, that when the husband pays for land conveyed to the wife, there is no resulting trust for the husband; but the purchase will be regarded and presumed to be an advancement and provision for the wife. This is fully supported by various cases, as well as by the best writers."

MASON, J., in the case of *Stockett* v. *Holliday*, 9 Md. 480, says: "The case of *Bowie* v. *Stonestreet*, 6 Md. Rep. 418, conclusively settles that a contract, which can be enforced in a court of equity, may be entered into between a husband and wife for the transfer of property from the former to the latter, for a *bona fide* and valuable consideration."

The Supreme Court of Vermont, in the case of *Barron* v, *Barron*, 24 Vt. 375, states the law thus: "And as a general rule, whenever a contract would be good at law, when made with trustees for the wife, that contract will be sustained in equity, when made with each other without the intervention of trustees. It is upon this principle that in many cases the husband will be held as trustee of the wife, and the wife entitled to the privileges belonging to a creditor of the husband."

Though a stranger's conveyance of property, or covenant to pay money to a married woman, or to a trustee for her, in order to give her a separate use, must contain words indicating such intention, it seems to be well settled that such words are unnecessary in the husband's conveyance or covenant. The law upon this subject is well stated by the Supreme Court of Conn., in *Deming* v. *Williams*, 26 Conn. 226, where it is said: "Now had such transfers been made by a parent into the name of a child, the child would acquire the interest as an advancement, such intent being inferred by law from the relationship of the parties. The same is true in case of a wife, where the husband purchases land and has the deed made directly to her, there being in the case no creditors or fraud upon any other party. The law attaches to absolute deeds and transfers a full alienation of the entire interest or property, so far as the alienation is permitted by the principles of law or equity. Such are all gifts or deeds

by husbands to wives of real or personal estate found in the books, from the case of *Slanning* v. *Style* (decided in 1734 and found in 3 P. Wms. 334), to the present time, and they are exceedingly numerous. They sustain the principle, that so far as the form and substance of the gift or alienation are important, that which would be good if made to a third person is good in a court of equity if made by the husband to his wife."

We have had urged upon our attention and consideration the cases of *White* v. *Wager*, 25 N. Y. 328, and *Winans* v. *Peebles*, 32 N. Y. 423. We have given these cases a careful consideration, and are of the opinion that they are not in conflict with the views we have expressed. In both of those cases the question involved was the validity of conveyances from wives to their husbands. We have already seen that a married woman in this State is under a disability so far as the alienation of her land is concerned. Her conveyance is absolutely void unless her husband joins with her. Such is the law in New York. None of the disabilities imposed upon married women have attached to the condition of a married man, who was as free to receive the title to property and to dispose of it after marriage as before, with the exceptions that he could not receive a deed directly from his wife, because she could not convey without his joining, and he could not join in a conveyance to himself, and that he had no power to dispose of or in any manner affect the inchoate right of his wife in and to his real estate. As to the world in general, the estate of marriage does not affect his ability to acquire title to or dispose of his property just as he might have done if he had not been married. These cases correctly held that a deed direct from a wife to her husband was void at law, and would not be sustained in equity, for the reason that this disability was imposed upon married women to protect them from the influence of their husbands.

The adjudicated cases in England are in entire accord with the decisions in this county. We refer to the following English and American cases on this subject, besides those here-

tofore referred to. *Lucas* v. *Lucas*, 1 Atk. 270; *Freemantle* v. *Bankes*, 5 Ves. 79; *Battersbee* v. *Farrington*, 1 Swanst. 106; *Latourette* v. *Williams*, 1 Barb. 9; *Neufville* v. *Thomson*, 3 Edw. Ch. 92; *McKennan* v. *Phillips*, 6 Whart. 571; *Kee* v. *Vasser*, 2 Ired. Eq. 553; *Stanwood* v. *Stanwood*, 17 Mass. 57; *Phelps* v. *Phelps*, 20 Pick. 556; *Adams* v. *Brackett*, 5 Met. 280; *Jones* v. *Obenchain*, 10 Gratt. 259; *Walter* v. *Hodge*, 2 Swanst. 97; *More* v. *Freeman*, Bunb. 205; *Lady Arundell* v. *Phipps*, 10 Ves. 139; *Shepard* v. *Shepard*, 7 Johns. Ch. 57; *Wood* v. *Warden*, 20 Ohio, 518; *Gaines* v. *Poor*, 3 Met. Ky. 503; *Ward* v. *Crotty*, 4 Met. Ky. 59; *Livingston* v. *Livingston*, 2 Johns. Ch. 237; *Fitch* v. *Ayer*, 2 Conn. 143; *Cornwall* v. *Hoyt*, 7 Conn. 420; *Whittlesey* v. *McMahon*, 10 Conn. 137; *Morgan* v. *The Thames Bank*, 14 Conn. 99; *The F. E. Society* v. *Mather*, 15 Conn. 587; *Winton* v. *Barnum*, 19 Conn. 171; *Hawley* v. *Burgess*, 22 Conn. 284; *Edwards* v. *Sheridan*, 24 Conn. 165.

From the foregoing authorities the following propositions are fairly deducible:

First. None of the disabilities imposed upon married women have attached to the condition of a married man, who is as free to receive the title to property and dispose of it after marriage as before, except that he cannot by his conveyance affect the inchoate right of his wife to his real estate.

Second. That a conveyance from a husband directly to his wife, without the intervention of a trustee, is void at law.

Third. That a direct conveyance from a husband to his wife will be sustained and upheld in equity in either of the following cases, namely: 1. Where the consideration of the transfer is a separate interest of the wife, yielded up by her for the husband's benefit or that of their family, or which has been appropriated by him to his uses. 2. Where the husband is in a situation to make a gift to his wife, and distintly separates the property given from the mass of his property, and sets it apart to the separate, sole, and exclusive use of his wife.

Fourth. Where a wife advances money to her husband, or the husband is indebted to the wife upon any valid con-

sideration, the wife stands as the creditor of her husband, and if the conveyance is made to pay or secure such liability, the wife will hold the property free from the claims of other creditors, where the transaction is unaffected by unfairness or fraud.

Fifth. Whenever a contract would be good at law when made with trustees for the wife, that contract will be sustained in equity, when made with each other, without the intervention of trustees.

Sixth. That prior to the recent legislation in this State authorizing married women to hold real estate to their separate use when a conveyance was made by a stranger to a married woman, or to a trustee for her, in order to give her a separate use in the property, it was necessary that such conveyance should contain words clearly indicating such intention; but such words were unnecessary in a conveyance from a husband to his wife, for the law presumed that it was intended for her separate and exclusive use.

Seventh. That section five of an act entitled "an act touching the marriage relation and liabilities incident thereto" (approved May 31st, 1852) made all property held by a married woman at the time of her marriage, or acquired by her subsequently, hers absolutely, and has enabled her to use, enjoy, and control the same independently of her husband and as her separate property; and that since the passage of that act a conveyance to a married woman need not contain words indicating that she is to hold the property to her separate use.

Eighth. That when conveyances from a husband to his wife have not been sustained in equity, it has been on account of some feature in them impeaching their fairness and certainty, as that they were not in the nature of a provision for the wife, or when they interfered with the rights of creditors, or when the property given or granted had not been distinctly separated from the mass of the husband's property.

Ninth. That in consequence of the absolute power which a man possesses over his own property, he may make any

disposition of it which does not interfere with the existing rights of others.

Tenth. When a husband is free from debt and has no children, and conveys property to his wife for a nominal consideration, the law will presume that it was intended as a provision for his wife.

Eleventh. That a conveyance from a husband to his wife which is good in equity vests the title to the property conveyed in the wife, as fully, completely, and absolutely as though the deed had been made by a stranger upon a valuable consideration moving from the wife.

It appears by the record in this case that the grantor was possessed of a large property; that in his will he disposed of about eight thousand dollars in specific legacies; that the value of the property disposed of in the residuary clause is not shown; that he had no children, and if he had died intestate his wife would have inherited his entire estate; that the rights of creditors were not interfered with by the conveyance in question; that the great and commendable anxiety displayed in his will for the welfare, comfort, and happiness of his wife tends to show that the conveyance which he had made a short time before was intended as a provision for his wife; and that in making his will he had such conveyance in his mind, and did not intend to devise to his brothers and sisters the property which he had previously conveyed to his wife.

We are clearly of the opinion that the conveyance in question was good in equity and should be sustained. The court committed no error in sustaining the demurrer to the complaint.

The judgment is affirmed, with costs.

J. N. Sims and *M. Bell*, for appellants.

W. L. McConnell, for appellee.

GRAHAM and Others v. HENDERSON.

EVIDENCE.—*Exclusion of.—Bill of Exceptions.*—No question in relation to the exclusion of evidence can be presented to the Supreme Court without a bill of exceptions shewing an offer to introduce the excluded evidence.

SAME.—*Declarations of Co-defendant.*—In a suit against several persons as partners or joint contractors, declarations made by one defendant to another, in the absence of the plaintiff, as to the terms of the contract, are inadmissible in evidence for the defendants.

SAME.—*Partnership.*—Where several persons are sued as partners, and there is an answer of general denial, the evidence must show that the defendants were partners.

SAME.—*Joint Contractors.*—Where several are sued as joint contractors, and the evidence shows that some are not liable, it is a failure of proof, and not a mere variance, and a finding against all is erroneous.

PRACTICE.—*Judgment.*—The provisions of the code concerning the rendition of judgment in favor of some and against others of several defendants joined in an action, applies only where there is a finding or verdict in favor of some, and against others, of the defendants, and not where there is a finding or verdict against all of them.

SAME.—*Motion for New Trial.*—Where the evidence does not justify a finding against one of several defendants, but does against the others, and there is a finding against all, a motion for a new trial by all the defendants, alleging that the finding is not sustained by the evidence, is sufficiently specific.

APPEAL from the Johnson Common Pleas.

DOWNEY, C. J.—Henderson sued Archibald C. Graham, Felix W. Graham, and James P. Graham. The complaint is in two paragraphs. The first paragraph alleges that the defendants are partners, and states that they sold to the plaintiff twelve hundred bushels of wheat to be delivered at his mill in Greenwood, &c., on or before the 19th day of June, 1868, for which the plaintiff was to pay and did pay two dollars per bushel; that the defendants were to pay the plaintiff interest on said money until the wheat should be delivered; that the defendants delivered one thousand and ninety-nine bushels and fifty-three pounds of said wheat, and have failed and refused to deliver the residue.

In the second paragraph it is stated that the defendants sold to the plaintiff a like quantity of wheat at, &c., on or

before the day aforesaid, for which the plaintiff agreed to pay the market price at Greenwood, at such time as defendants might call for a settlement; that the plaintiff, at the time of making the said contract, advanced to said defendants twenty-four hundred dollars, on which they agreed to pay interest; that defendants delivered one thousand and ninety-nine bushels and fifty-three pounds of wheat on said contract, and have failed and refused to deliver any more; and that the defendants called for a settlement on the 19th day of June, 1868, when the price of wheat was two dollars per bushel, which price they agreed to take, and pay him the balance of the amount which he had advanced and the interest, which they have failed to do.

To the complaint the defendants answered by a general denial, and secondly, that the defendants sold to the plaintiff eleven hundred bushels of wheat, to be delivered at his mill, at, &c., on or before, &c., he agreeing to pay them at the market price at Greenwood in the spring of 1868; that they delivered to him eleven hundred bushels of wheat; that the market price in the spring of 1868 was two dollars and forty cents per bushel; that besides the twenty-four hundred dollars paid them there was yet due them two hundred and forty dollars and interest thereon; wherefore, &c. There was a reply by general denial to the second paragraph of the answer. The cause was then tried by the court, and there was a finding for the plaintiff for two hundred and ninety-six dollars and forty-eight cents. Motion for a new trial overruled, and judgment on the finding.

The motion for a new trial was for the reasons that the finding of the court was not sustained by sufficient evidence, was contrary to law, and because of the improper exclusion of evidence by the court.

The only error assigned is the refusal of the court to grant a new trial.

The first point made with reference to the exclusion of evidence is that the court erred in refusing to allow the defendants to prove by the defendant Felix W. Graham, that he

communicated to the defendant Archibald C. Graham the terms of the contract made by the plaintiff and said Felix W. Graham, on which the suit is brought. It is enough to say that the bill of exceptions does not show any offer of such evidence.

The second point relating to the exclusion of evidence is, that the court erred in refusing to allow Archibald C. Graham to testify as to his understanding of the terms of the contract sued on, &c. The bill of exceptions states that the offer was to prove that "he had been informed by the defendant Felix W. Graham," &c. If it was competent for the defendants to prove the understanding of one of them as to the terms of the contract, that proof could not be made by proving what one of his co-defendants had said about it, in the absence of the plaintiff.

Next as to the sufficiency of the evidence. The first paragraph of the complaint charges the defendants as partners. The second charges them as joint contractors. The general denial required the plaintiff to prove that all the defendants were liable under the first paragraph as partners, and under the second paragraph as joint contractors. There was no evidence whatever that the defendants were partners; without this evidence the case was not made out under the first paragraph. *Tomlinson* v. *Collett*, 3 Blackf. 436; *Dickensheets* v. *Kaufman*, 28 Ind. 251.

The evidence shows the making of two contracts with reference to the sale of wheat, one by Felix W. Graham, one by Archibald C. Graham, each separately. James P. Graham is not shown to have been in any way concerned or interested in either of the contracts; and therefore his liability is not shown.

Counsel for the appellee insist that this is merely a variance, and not such a defect of evidence as will justify a reversal of the judgment; that as the code authorizes judgment against all or any of the defendants, whether the contract be joint or several, as held in *Hubbell* v. *Woolf*, 15 Ind. 204 the attention of the court should have been spec-

ially directed, by the motion for a new trial, to this point; and that the general statement in the reasons for a new trial, that the evidence was not sufficient to sustain the finding of the court, was not enough. We cannot agree to this. It is only where the court or jury finds for some of the defendants and against others, that judgment can be so rendered. Here there was a finding against all the defendants, and a judgment in accordance with the finding. The evidence was insufficient to justify this finding and judgment as to one, if not as to two, of the defendants, and the reason for a new trial was sufficiently specific.

The judgment is reversed, with costs, and the cause remanded, with directions to grant a new trial.

S. P. Oyler and *D. W. Howe*, for appellants.

G. M. Overstreet and *A. B. Hunter*, for appellee.

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GRIMES' Executors v. HARMON and Others.

CHARITABLE USE.—*Will.*—The residuary clause of a will was as follows: "Item. I give and bequeath the residue of my estate, after the foregoing bequests have been fully paid, to the orthodox protestant clergymen of Delphi and their successors, to be expended in the education of colored children, both male and female, in such way and manner as they may deem best, of which a majority of them shall determine; my object in this bequest being to promote the moral and religious improvement and well being of the colored race."

No organized or corporate body known as the orthodox protestant clergymen of Delphi existed at the time of the execution of the will or afterwards.

Held, in a suit by the heirs at law of the testator against his executors, that said residuary clause was void at law for vagueness and uncertainty, and incapable of judicial enforcement by a court of chancery possessing only the ordinary powers of a court of equity, and therefore could not be sustained by the courts of this State.

CHARITABLE USES.—*Cy Pres Power.—Prerogative.*—The power possessed by the court of chancery in England in reference to charitable uses, so far as it differs from the power exercised by that court in other cases of trust, does

not belong to that court as a court of equity, nor is it a part of its judicial power and jurisdiction, but it is a branch of the prerogative power of the king as *parens patriæ*, which he exercises by the chancellor.

SAME.—*Prerogative Power.—Whence Derived.—Statute of* 43 *Elizabeth.*—This prerogative power was derived directly from the king under his sign-manual, and was not conferred on the court by the statute of 43 Elizabeth, commonly called the Statute of Uses, but was exercised by the court before the passage of that act, which created no new law or new objects of charity, but only provided a new remedy for existing rights, by creating a new and ancillary jurisdiction by commission, and which was local to the kingdom of Great Britain.

SAME.—*Power of Courts of this State.*—The courts of this State, possessing no prerogative power, and being incapable of administering and enforcing the remedy provided in England by the statute of 43 Elizabeth, have only judicial power, and can only exercise in reference to charitable uses and trusts such power and jurisdiction as was and is possessed and exercised by the court of chancery in England acting as a court of equity.

SAME.—The *cy pres* power, which constitutes the peculiar feature of the English system, and is exerted in determining gifts to charity, where the donor has failed to define them, and in framing schemes of approximation near to or remote from the donor's true design, is unsuited to our institutions, and has no existence in the jurisprudence of this State on this subject.

SAME.—A devise or grant to a corporation capable of holding, or to a person or persons, either by name or so described that they can be readily ascertained, for a definite and specific use, is good at law; and the powers of a court of chancery are confined to the mere execution of the trust, to secure the faithful application of the fund or property to the use and object indicated in the deed or will; in other words, to carry out the intention of the grantor or testator as thus expressed.

SAME.—*What Constitues a Charitable Use.*—To constitute a charitable use, there must be a donor, a trustee competent to take, a use restricted to a charitable purpose, and a definite beneficiary. Where, in case of a grant or devise, no party or parties are designated who can take the property, or where they are so uncertain that the court cannot direct intelligibly the execution of the trust, the property remains undisposed of and falls to the heir or next of kin. A court of chancery, always acting for the beneficiaries, stops the instant it ascertains that there are none, or that they are so uncertain that it will have to act in the dark when it sets about application of the trust.

SAME.—*When Court of Chancery will Interpose.*—The jurisdiction of the court of chancery is not to create a trust. Its powers in this country are merely to direct the execution of the donor's intention, and to prevent the object from being deprived of the benefit intended. The court, in all of its doings, represents the persons, institutions, and classes who are to be benefitted. It interposes for the beneficiaries alone; and when invoked by the trustees it is only that they require the interposition of the court to effect the purpose and to secure to the beneficiaries the charity of which they should be the just recipients.

SAME.—*Uncertain Beneficiaries.*—A gift to charity is maintainable in this State, if made to a competent trustee, and so defined that it can be executed as made by the donor by a judicial decree, although the beneficiaries are not designated by name or specifically pointed out, if the trustee is invested with full and ample discretion to select the beneficiaries of such charity from a class of persons named; but where the beneficiaries are described as the children, both male and female, of a certain race in the United States, and where that race consists within the United States of about four million persons, it is impracticable to ascertain the beneficiaries and to distribute the proportionate share of such fund to each of such beneficiaries; and where, in such case, the trustees have no discretionary power to select the beneficiaries from the class named, the gift is void for vagueness and uncertainty.

SAME.—There is no difference whether a devise or bequest be immediate to an indefinite object or to a trustee for the use and benefit of an indefinite object. If it be immediate to an indefinite object, it is void; and if it be a trust for an indefinite object, the property that is the subject of the trust is not disposed of, and the trust results to the benefit of those to whom the law gives the property in the absence of any other disposition of it by the testator or donor.

SAME.—*Trustees with Discretion to Select Beneficiaries.*—If the charity does not fix itself upon any particular object, but is general and indefinite, such as the promotion of the moral and intellectual condition of a race, or the relief of the poor, and no plan or scheme is prescribed, and no discretion is lodged by the testator in certain and ascertainable individuals, it does not admit of judicial administration. In such a case, in England, the administration of the charity is cast upon the king, to be executed *cy pres*, while in this country the property devised lapses to the next of kin. If, however, in such a case, certain and ascertainable trustees are appointed with full powers to select the beneficiaries and devise a scheme or plan of application of the funds appropriated to the charitable object, the court will, through the trustees, execute the charity.

SAME.—*Supplying Trustees.*—Where trustees capable of taking the legal estate have been appointed originally, so that a valid use has been in the first instance raised, and the case has been thus brought within the jurisdiction of the court of chancery, that court will supply any defect which may arise in consequence of the death or disability of the trustees or their refusal to act, by appointing new trustees in their place; but where no competent trustees have been in the first instance appointed, so that no legal estate has ever vested, no use has been raised, and the court of chancery has acquired no jurisdiction of the case.

WILL.—*Construction.*—It is a well settled rule, that all the parts of a will are to be construed together and in relation to each other, so as, if possible, to form one consistent whole; and that words and limitations may be transposed, supplied, or rejected, where warranted by the immediate context or the general scheme of the will, but not merely on conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument; and such a construction should be placed upon

the will as to sustain and uphold it in all its parts, if this can be done consistently with the established rules of law and construction.

SAME.—*Parol Evidence.—Mistake.—Ambiguity.*—The general rule is, that parol evidence of the intention of a testator is inadmissible for the purpose of explaining, contradicting, or adding to the contents of a will, but that its language must be interpreted according to its proper signification, or with as near an approach thereto as the body of the instrument and the state of circumstances existing at the time of its execution will admit of. The doctrine in reference to mistakes in wills is, that courts of equity have jurisdiction to correct them when they are apparent upon the face of the will; but they must be so apparent, and must be such as may be made by a proper construction of the terms of the will; otherwise there can be no relief. Parol evidence, or evidence *dehors* the will, is not admissible to vary and control the terms of the will, although it is admissible to remove a latent ambiguity.

CHURCH.—*Jurisdiction of Courts over.*—Over the church, as such, the legal tribunals do not have, or profess to have, any jurisdition whatever, except to protect the civil rights of others and to preserve the public peace. All questions relating to the faith and practice of the church and its members belong to the church judicatures to which such members have voluntarily subjected themselves. But the civil courts will interfere with churches and religious associations and determine upon questions of faith and practice of a church where rights of property and civil rights are involved.

CASES OVERRULED.—*Statute of* 43 *Elizabeth.*—So far as the cases of M'Cord *v.* Ochiltree, 8 Blackf. 15; Sweeney *v.* Sampson, 5 Ind. 465; and The Common Council of Richmond *v.* The State, 5 Ind. 334, decide that the power and jurisdiction of the courts of this State have been enlarged by the statute of 43 Eliz., and that such statute can be executed in this State, they are overruled.

APPEAL from the Carroll Common Pleas.

BUSKIRK, J.—The appellees filed in the court below, on the 8th day of January, 1868, their complaint against the appellants, in which the following facts are stated: that Samuel Grimes, on the 31st day of August, 1864, executed his last will and testament, at the city of Baltimore, and State of Maryland; that he departed this life at said city, on the 2d day of September, in the year 1864; that at the time of his death he was a *bona fide* resident of the city of Delphi, county of Carroll, and State of Indiana; that the said decedent departed this life without issue, leaving neither father nor mother nor wife surviving him; that the plaintiffs are his heirs at law; that the said decedent departed this life the owner of about eight thousand dollars worth of personal property, and seized

in his own right of a large body of real estate, worth, in the aggregate, about twenty thousand dollars, all of which property was situated in the county of Carroll, and State of Indiana; that said will was duly proved and admitted to probate in the said city of Baltimore and State of Maryland, on the 18th day of November, 1864; that the appellants, who were named in said will as executors thereof, produced to the court of common pleas in said county of Carroll, in the State of Indiana, on the 30th day of January, 1865, a duly authenticated copy of the said will and the probate thereof; that the court, being satisfied that the said instrument ought to be allowed as the last will and testament of the said decedent, ordered the same to be filed and recorded; that the clerk of said court thereupon issued to the appellants letters testamentary, who gave bond, qualified, and entered upon the discharge of their duties as executors of said will; that the said executors had converted the real and personal property of which the said decedent died seized and possessed into money; that they had in their hands cash assets, the proceeds of the sale of the said real and personal property, amounting to about thirty thousand dollars; that the bequests in the said will to Lany G. Beck, Alice J. Beck, Jennie Beck, Fannie Beck, and Walter Beck, children of Dr. E. W. H. Beck, have all been fully paid by the said executors; that the plaintiffs, then and there, waived all right to recover the same back and all relief whatever, either as against said executors or those to whom they had paid said legacies; and that said will was void, for the following reasons, namely:

"Because, as they aver and expressly charge, there existed at the time when the said pretended will was executed, no organized or corporate body known as 'the orthodox protestant clergymen of Delphi,' in the county of Carroll, and State of Indiana, or elsewhere. Nor does there now, nor has there at any time since the execution of the said pretended will existed any such organized or corporate body; and also, because the terms used in the will, 'colored children' and

'colored race,' are so vague on account of their universality, that it is impossible to ascertain who the testator intended should be the objects of his charity; wherefore, inasmuch as no person or persons are designated who should select or appoint the beneficiaries under the will, and the will itself fails to designate such beneficiaries with any degree of precision, and also omits to prescribe the mode in which the charity shall be distributed or applied, the plaintiffs aver that the said will is void for uncertainty, and impracticable of execution so far as the bequests in behalf and for the benefit of 'colored children' of the 'colored race' are concerned."

The second paragraph of the complaint contained the same allegations as the first, with the additional one that the said decedent was at the time of the execution of the said will of unsound mind and incapable of making a will.

The prayer of the complaint was as follows:

First, that the probate of the said will should be revoked and set aside.

Second, that the said will be declared void and held for nought, and that said plaintiffs be admitted to the inheritance of the estate, real and personal, of which the said Samuel Grimes died seized and possessed.

Third, that the letters testamentary issued by the order of the court to the defendants be set aside and held as nought.

Fourth, that the said defendants be enjoined from further interfering with said decedent's estate.

Fifth, that the defendants as such executors be required to pay into court all moneys in their hands belonging to the estate of the said decedent.

The appellants demurred to the first paragraph, and answered the second in the nature of confession and special denial. The demurrer to the first paragraph was overruled, and an exception taken. The appellants refused to answer further to the first paragraph, and final judgment was rendered for the appellees upon that paragraph. The parties in open court waived a trial upon the issues formed upon the

second paragraph of the complaint and the answer thereto. The appellants prosecute this appeal to obtain a reversal of the judgment rendered in favor of the appellees and against the appellants upon the demurrer to the first paragraph of the complaint.

The will was made a part of the complaint. The testator, after making several bequests to the children of Dr. E. W. H. Beck, disposed of the residue of his estate as follows:

"Item. I give and bequeath the residue of my estate, after the foregoing bequests have been fully paid, to the orthodox protestant clergymen of Delphi, and their successors, to be expended in the education of colored children, both male and female, in such way and manner as they may deem best, of which a majority of them shall determine; my object in this bequest being to promote the moral and religious improvement and well being of the colored race."

The only error assigned is based upon the action of the court in overruling the demurrer to the first paragraph of the complaint. Was this ruling correct?

It is maintained with great earnestness and ability by the learned counsel for the appellants that the will of the said decedent was, in all respects, legal and valid, and that the bequest contained in the residuary clause is capable of being executed by the courts.

It is maintained with equal earnestness and ability by the learned counsel for the appellees, that the residuary clause of said will is void for uncertainty and incapable of execution for two reasons: First, that there is no trustee legally competent to take and hold the property. Secondly, that the use is not clearly defined. The first objection affects the trust, and the other the use. Charitable uses, like all other uses, comprise a trust as well as a use. To constitute a valid use, there must be, in all cases, first, a trustee legally competent to take and hold the property; and secondly, a use for some purpose clearly defined.

It is true that where trustees capable of taking the legal estate were originally appointed, so that a valid use was in

the first instance raised, and the case was thus brought within the jurisdiction of the court of chancery, that court would not afterwards suffer the use to fail, but would supply any defect which might arise in consequence of the death, disability, or refusal of the trustees to act, by appointing new trustees in their place; but when no competent trustees were in the first instance appointed, so that no legal estate ever vested, of course no use was raised, and the court of chancery acquired no jurisdiction of the case.

The law upon this subject is well stated by the court of appeals of the State of New York, in the case of *Downing* v. *Marshall*, 23 N. Y. 366, where it is said: "And, first, we think that the residuary devise and bequest were void as to the unincorporated Home Missionary Society. That society is composed of a fluctuating and unascertained class of persons having no legal capacity to take the gift. The beneficiaries are the entire community within the influence of the society. There is no trustee competent to take the fund so as to secure its appropriation to the benevolent purpose intended. That such a gift is void according to legal rules, it needs no argument to prove. There is no trustee, and there are no beneficiaries ascertained, either as individuals or as a class of persons. These objections are fatal. It is said that a trust shall never fail for the want of a trustee, because a court of equity will supply the defect. But this is true only of a valid trust, and in order to be valid, it must be so constituted that a title can vest in some person, natural or artificial, by force of the gift itself. The principles on which this question depends have heretofore been fully examined by this court. A charitable donation, precise and definite in its purpose, void at law because the benficiaries are unascertained, may be maintained if there be a competent trustee to take the fund and effectuate the charity. If there be no such trustee it fails, and the heir or next of kin is entitled. (*Williams* v. *Williams*, 4 Seld. 525; *Owens* v. *The Missionary Society*, 4 Kern. 380; *Beekman* v. *Bonsor*, *ante*, 298.) It is true in the present case, that according to the dispositions

made by the testator the executors were appointed devisees and legatees in trust, but they were not constituted trustees of the charity. The objects of the charity were mankind in general, or that portion of mankind within the sphere of the missionary labor carried on by the society. It had no trustees except the unincorporated persons forming the society itself. The duty of the executors would be fully performed by paying over the income, and ultimately the principal, of the fund to any agent of those persons. Those persons were a fluctuating body unknown to the law, irresponsible to the courts, and incapable of receiving a gift even for a purpose which the law may denominate charitable."

It was said by this court, in *M'Cord* v. *Ochiltree*, 8 Blackf. 15, that, "The legacy in controversy is void at law, because the objects of the testator's benevolence, pious, indigent youths preparing for the ministry of the gospel according to a particular standard of faith, are too vaguely indicated to enable them to take the legacy without the interposition of a trustee; and because there was, at the death of the testator, no existing trustee capable of executing the trust intended to be created by the will. The Theological Seminary, being at that time an unincorporated society, could not execute a trust of that character, being the application of a permanent fund to a particular purpose, for the want of succession."

It was held in *Beekman* v. *Bonsor*, 23 N. Y. 298, that, "A gift to charity which is void at law for the want of an ascertained beneficiary will be upheld by the courts of this State, if the thing given is certain, if there is a competent trustee to take the fund and administer it as directed, and if the charity itself be precise and definite."

Let us apply these principles of law to the case under consideration, and see whether there is a legal trustee and an ascertained, precise, and definite beneficiary. The appellants were by the testator appointed the executors of his will, with power to convert his real and personal property into cash, but they were not constituted the trustees of the charity.

Their duties will end when they pay the money over to the persons charged with the execution of the trust. So they cannot be regarded as trustees. The devise is to the orthodox protestant clergymen of Delphi. It is averred in the complaint, and admitted by the demmurrer, that at the time when the will was executed and when the testator departed this life there did not exist in the town of Delphi an organized voluntary or corporate body known as "The orthodox protestant clergymen of Delphi."

This being admitted, it necessarily results that there was no artificial trustee in existence competent to execute the trust.

But is is maintained by the appellants that the testator intended that his trust should be executed by natural persons, and not by an organized or corporate body. Did the testator intend to designate natural persons by the phrase "The orthodox protestant clergymen of Delphi," as contradistinguished from an associated or corporate body?

It is a well settled rule of construction, that all the parts of a will are to be construed together and in relation to each other, and so as, if possible, to form one consistent whole, and that words and limitations may be transposed, supplied or rejected, where warranted by the context or the general scheme of the will, but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument. 1 Redf. on Wills, 430. It is our duty to place such a construction upon the will as will sustain and uphold it in all its parts, if it can be done consistently with the established rules of construction of the law.

It seems quite evident to the court that the testator looked to and contemplated a perpetuity, by using the phrase "and their successors;" and it is equally clear that he intended that his trust should be executed by associated action, by providing that a majority of the persons designated as orthodox protestant clergymen of Delphi should determine the manner of its execution. If the court can determine, by

the established and well settled rules of construction, from the language employed in the instrument, which was intended, an organized or incorporated body or natural persons, it is required by the law to do so. But suppose that the court is unable by construction to determine which was meant, would it be competent to receive parol evidence to show which was intended?

Ambiguities are of two kinds, patent and latent. A patent ambiguity is one which appears on the face of the instrument, that which occurs when the expression of an instrument is so defective that a court of law which is obliged to put a construction upon it, placing itself in the situation of the parties, cannot ascertain therefrom the parties' intention.

A latent ambiguity is 'one which arises from some collateral circumstance, or extrinsic matter, in cases where the instrument is itself sufficiently certain and intelligible. Bouvier's Law Dictionary.

The ambiguity in the case under consideration arises upon the face of the instrument. It is therefore a patent ambiguity, and the law is well settled that it cannot be explained by extrinsic evidence *dehors* the will, while a latent ambiguity may be explained by extrinsic parol evidence. See *Mann* v. *Mann's Ex'rs.*, 1 Johns. Ch. 231; *McAlister* v. *Butterfield*, 31 Ind. 25; *Jackson* v. *Payne's Ex'rs.* 2 Met. Ky. 567; *Worthington* v. *Hylyer*, 4 Mass. 196; 1 Jarman on Wills, 315; 2 Redfield on Wills, 398; *Mellish* v. *Mellish*, 4 Ves. 45; 1 Story Eq. secs. 179, 183.

In *Jackson* v. *Payne's Ex'rs.*, *supra*, the court say: "The general rule is, that parol evidence of the intention of a testator is inadmissible for the purpose of explaining, contradicting or adding to the contents of a will; but that its language must be interpreted according to its proper signification, or with as near an approach thereto as the body of the instrument and the state of circumstances existing at the time of its execution will admit of. The doctrine in regard to mistakes in wills is, that courts of equity have jurisdiction to correct them when they are apparent upon the face of the

will. But the mistakes must be apparent upon the face of the will, and must be such as may be made out by a proper construction of its terms, otherwise there can be no relief. Parol evidence, or evidence *dehors* the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity."

In *Mellish* v. *Mellish, supra*, the master of the rolls said: "The rule is, that whenever there is a clear mistake or a clear omission, recourse is to be had to the general scope of the will, and the general intention to be collected from it, and that there is a mistake. I do not find enough to convince me that there is a mistake, and whenever it comes to be a doubt, the safest way is to adhere to the words."

But suppose there is in the will under consideration such an ambiguity as can be explained by extrinsic parol evidence, by what rule is the court to be governed in ascertaining the persons intended to act as trustees? It is admitted that there was no organized or corporate body in existence answering to the description of "the orthodox protestant clergymen of Delphi;" consequently there was no artificial body competent to take and act as trustees.

On the other hand, if he intended that natural persons should act as trustees, they are not designated by their proper names. They are referred to as a class of persons possessing certain qualities and entertaining certain beliefs. They have to be, not only protestants, but orthodox. The word protestant, as used in the will, evidently embraces all religious persuasions which deny the pretensions of the church of Rome to apostolic succession and to infallibility. The word orthodox, as applied to religious matters, is defined by Webster to mean, "sound in christian faith, believing in the genuine doctrines taught in the scriptures."

The competency of the persons to act as trustees is not made to depend upon whether they belonged to any particular church or religious denomination, but it is made to depend upon whether they are orthodox in faith. It is very

evident that the testator did not regard all protestants as being orthodox, for if he had, his bequest would have been to the protestant clergymen of Delphi, omitting the word "orthodox."

In what manner, and upon what proof, is the court to determine who is orthodox, and who is heterodox? The testator has not established any standard or test by which the court should be governed in determining the question. It is quite obvious that all protestant denominations are not orthodox, for they widely differ from each other upon the most vital and essential principles of the Christian faith. The various protestant denominations do not regard each other as orthodox.

It is maintained by the counsel for the appellees that the courts of this State possess no jurisdiction to hear and determine questions of religious faith.

The importance and magnitude of the question involved in the above proposition cannot be overestimated. In *Chase* v. *Cheney*, 10 Am. Law Reg. (N. S.), 295, the Supreme Court of Illinois say: "In this unhappy controversy is involved a grave question, and of deeper moment to all Christian men; indeed, to all men who believe that Christianity, pure and simple, is the fairest system of morals, the firmest prop to our government, the chiefest reliance in this life, and the life to come. Shall we maintain the boundary between church and state, and let each revolve in its respective sphere, the one undisturbed by the other? All history warns not to rouse the passion or wake up the fanaticism which may grapple with the state in a deathly struggle for the supremacy.

"Our constitution provides that the 'free exercise and enjoyment of religious professions, and worship, without discrimination, shall forever be guaranteed.' In ecclesiastical law, profession means the act of entering into a religious order. Religious worship consists in the performance of all external acts and the observance of all ordinances and ceremonies, which are engaged in with the sole and avowed object

of honoring God. The constitution intended to guarantee from all interference by the State, not only with each man's religious faith, but his membership in the church, and the rights and discipline which may be adopted. The only exception to uncontrolled liberty is, that acts of licentiousness shall not be excused, and practices inconsistent with the peace and safety of the State shall not be justified. Freedom of religious profession and worship cannot be maintained if the civil courts trench upon the domain of the church, construe its canons and rules, dictate its discipline, and regulate its trials."

In *Gartin* v. *Penick*, in the court of appeals of Kentucky, 9 Am. Law Reg. (N. S.,) 210, Judge ROBERTSON, who delivered the opinion of the court, said: "Christianity, though an essential element of conservatism, and a great moral power in the state, should work by love, and inscribe the laws of liberty and light on the heart; and civil government has no just or lawful power over the conscience, or faith, or form of worship, or church creeds, or discipline, as long as their fruits neither unhinge civil supremacy, demoralize society, nor disturb its peace or security."

We have no state religion. The constitution of our State provides, that "all men shall be secured in their natural right to worship Almighty God according to the dictates of their own consciences." The law knows and can make no distinction between protestant and catholic. Orthodox and heterodox are alike under the protection of the law.

Judge COOLEY, in his valuable work on Constitutional Limitations, says: "It is frequently said that Christianity is a part of the law of the land. In a certain sense, and for certain purposes, this is true. The best features of the common law, and especialy those which relate to the family and social relations, which compel the parent to support the child, and the husband the wife, which make the marriage tie permanent and forbid poligamy, have either been derived from, or have been improved and strengthened by, the prevailing religion and the teachings of its sacred book. But the

law does not attempt to enforce the precepts of Christianity on the ground of their sacred character or divine origin. Some of these precepts are universally recognized as being incapable of enforcement by human laws, notwithstanding they are of continued and universal obligation. Christianity, therefore, is not a part of the law of the land, in the sense that would entitle the courts to take notice of and base their judgments upon it; except so far as they should find that its precepts had been incorporated in, and thus become a component part of, the law." Cooley's Const. Lim. 472.

The same learned author in another place says: "Whatever, therefore, may have been their individual sentiments upon religious questions, or upon the propriety of the state assuming any supervision of religious affairs under other circumstances, the general voice has been to make all persons equal before the law, and to leave questions of religious belief and religious worship to be questions between every man and his Maker, which human tribunals are not to take cognizance of, so long as the public order is not disturbed, except as the person himself, by voluntary action in associating himself with a religious organization, may have conferred upon such organization a jurisdiction over him in ecclesiastical matters. These constitutions, therefore, have not established religious toleration merely, but religious equality."

Congress is forbidden, by the first amendment to the constitution of the United States, from making any law respecting an establishment of religion, or prohibiting the free exercise thereof. Mr. STORY says of this provision: "It was under a solemn consciousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, exemplified in our domestic, as well as in foreign annals, that it was deemed advisable to exclude from the national government all power to act upon the subject. The situation, too, of the different states equally proclaimed the policy, as well as the necessity, of such an exclusion. In some of the states Episcopalians constituted the predominant sect; in others Presbyterians; in others

Congregationalists; in others Quakers; and in others again was a close numerical rivalry among contending sects. It was impossible that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment. The only security was extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of all religious tests. Thus the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Armenian, the Jew and the Infidel, may sit down at the common table of the national councils without any inquisition into their faith or mode of worship." Story Const., sec. 1879.

The power thus left to the states has been exercised in our State by proclaiming in our organic law religious toleration and religious equality. We hold that there is no test or standard of orthodoxy established by the constitution or laws of our State, and that the courts of this State possess no power to investigate questions of religious faith or belief, or to determine who are orthodox or who are heterodox, except where the rights of property or civil rights are involved.

It was recently held by the Supreme Court of Illinois, in the case of *Chase* v. *Cheney*, 10 Am. Law Reg., (N. S.) 295, that "the civil courts will interfere with churches or religious associations when rights of property and civil rights are involved;" and in support of this doctrine the following cases are referred to: *The Baptist Church* v. *Witherell*, 3 Paige, 296; *Lawyer* v. *Cipperly*, 7 Paige, 281; *Gable* v. *Miller*, 10 Paige, 627; *Miller* v. *Gable*, 2 Denio, 492; *Robertson* v. *Bullions*, 9 Barb. 64; *Diffendorf* v. *Ref. Cal. Church*, 20 Johns. 12; *The German Ref. Church* v. *Seiberi*, 3 Barr, 291; *Shannon* v. *Frost*, 3 B. Mon. 258; *Garten* v. *Penick*, *supra*; *Forbes*

v. *Eden*, Law Rep. 1, Scotch & Div. Appeals, 568; *Ferrari* v *Vasconcelles*, 36 Ill. 46.

In *Baptist Church* v. *Witherell, supra*, the court say: "Over the church, as such, the legal tribunals do not profess to have any jurisdiction whatever, except to protect the civil rights of others and to preserve the public peace. All questions relating to the faith and practice of the church and its members belong to the church jurisdictions to which they have voluntary subjected themselves."

In *Ferrari* v. *Vasconcelles, supra*, the court say: "Whilst we will decide nothing affecting the ecclesiastical right of a church, which we are not competent to do, its civil rights to property are subjects for our examination, to be determined in conformity to the laws of the land and the principles of equity."

In all the above cases, where it was held that the civil courts would interfere with churches and religious denominations, when the rights of property and civil rights are involved, except the case of *Chase* v. *Cheney*, the church was asserting a right to property; but we suppose that the principles of law would be the same whether the church or a third party was asserting a right to property, when such right depended upon the question of religious faith.

The testator had the undoubted right to prescribe a standard or test of orthodoxy and heterodoxy; and if he had done so, we can readily see how the court could have heard the proof and determined whether the persons who claimed the right to act as trustees came up to and filled the standard or test as prescribed. There was no testimony offered in the court below to prove, or as tending to prove, that any protestant clergyman of Delphi was orthodox. We will not attempt in advance to determine what evidence would be competent and admissible, or incompetent and inadmissible. What we do decide is, that when rights of property or civil rights, as contradistinguished from ecclesiastical rights, are involved, and such rights depend upon the religious faith or orthodoxy of citizens, or the rules, discipline and practice

of churches or religious denominations, the courts of this State may hear evidence and determine judicially all such questions, so far as they affect the rights of persons or religious denominations to property or civil rights.

But suppose that competent trustees can be ascertained; can they execute the trust? Are the beneficiaries so described that they can be ascertained? And if they can be ascertained, is there any plan or scheme devised by the testator directing the manner in and the purposes for which the money was to be expended? And if there is no plan or scheme, is there a discretion vested in the trustees authorizing them to select the beneficiaries and determine the manner in which the trust should be executed? The beneficiaries are not designated except by the general, vague, and sweeping expression, "colored children, both male and female." We will not stop to inquire whether the expression "colored" was intended to embrace all races except the white, or Caucasian. This is its meaning in common parlance. We will adopt, for the purpose of considering the case, but without deciding that the language employed admits of this limited construction, the construction insisted upon by the learned counsel for the appellants, that the testator had exclusive reference to children of the African race, domiciled in the United States and her territories. The class, then, from which the beneficiaries are to be selected numbers about four millions.

It will be observed that no scheme or plan, such as the foundation of a college, a seminary of learning, or a theological institute, is prescribed. The character of the education to be given—whether moral, religious, literary or scientific—is not prescribed. The purpose expressed is to promote the moral and religious improvement and well being of the colored race by educating the colored children, both male and female, but the particular kind of education is not prescribed. It would be impracticable to distribute the fund ratably among the beneficiaries. There is no power or discretion lodged in any person, natural or artificial, to select the ben-

eficiaries from the mass of children of the African race in this country. Can the courts, in the exercise of their judicial functions, select the beneficiaries? If neither the trustees nor the courts can select the beneficiaries, is not the residuary devise and bequest void for uncertainty?

These questions are discussed with great learning and ability by CHURCH, C. J., in the case of *White* v. *Fisk*, 22 Conn. 31. In that case the following clause of the will under consideration was held void for uncertainty: "Any surplus income that may remain, to the extent of one thousand dollars per annum, I direct to be expended by my trustees for the support of indigent, pious young men preparing for the ministry in New Haven, Connecticut." When the case was heard there were indigent, pious young men in New Haven, Connecticut, preparing for the ministry. CHURCH, C. J., in delivering the opinion of the court, said: "While we acknowledge the benevolent and charitable intention of the testator in this gift, and the laudable purpose he conceived, we cannot see how, confining ourselves within what we believe to be our legitimate powers of interpretation and judgment, we can carry that intention into effect. The legacy is not given to any college or institution, * * * but only as a legal interest to trustees, to be expended or disbursed for the support of individuals, each one of whom falling within the description named has an equitable or beneficial interest in the fund, and which he must have a right to enforce if any one can. And who are these individuals? They are the indigent, pious young men preparing for the ministry in New Haven. The difficulty of carrying this provision into effect is as great as if no trustee had been appointed; for no rule of determination, selection, or appointment is furnished by the will, and no positive or discretionary power of determination bestowed. * * * Who then are entitled to this bequest? What is meant by indigent young men? No rule of discrimination is given. And who but Him that knoweth the heart can determine who are the pious ones intended by the testator. Surely he

did not intend all who merely make professions of piety. And what was meant by preparing for the ministry in New Haven? Was it a preparation by a course of theological or academical study?"

Every feature of uncertainty pointed out by Chief Justice CHURCH, in the above cited case, exists, with bolder outlines, in the case at bar. It is certainly as difficult to ascertain whether a man is orthodox as whether he is pious. In the first case there exists the double inquiry, what principles are orthodox? and whether a given person professing them does, in fact and at heart, entertain them. Piety is indicated by a man's daily walks in life; his orthodoxy is not. In the Connecticut case, the beneficiaries were in a degree pointed out. They were to be indigent, pious young men preparing for the ministry in New Haven, Connecticut. In the case at bar, the beneficiaries are to be taken from a class numbering millions, and no rule of selection or appointment is prescribed. In the case at bar, the character of the education to be given is not attempted to be described. The case of *White* v. *Fisk* was well considered, and is cited by the later cases involving this question, with approval.

In the case of *Fontain* v. *Ravenel*, 17 How. U. S. 368, the testator in his will had authorized and empowered his executors, or the survivor of them, after the decease of his wife, to dispose of certain portions of his estate, for the use of such charitable institutions in Pennsylvania and South Carolina as they or the survivor of them might deem most beneficial to mankind, and so that part of the colored population in each of said states should partake of the benefits thereof. The executors died without executing the trust. The case was considered as governed by the laws of Pennsylvania, where the principles of the statute of 43 Elizabeth are recognized by the courts. The court held that the clause of the will above recited was too uncertain for judicial administration, and that the executors having died without exercising the discretion conferred upon them by the testator, the property devised lapsed to the next of kin. In this case

the distinctions between English and American law on this subject are clearly drawn.

Justice McLEAN, in this case, makes use of this language: "There is not only uncertainty in the beneficiaries of this charity, but behind that is a more formidable objection. There is no expressed will of the testator. He intended to speak through his executors, or the successors of them, but by the acts of Providence this has became impossible. It is then as though he had not spoken. Can any power now speak for him, except the *parens patriæ?*"

In the case of *Beekman* v. *Bonsor*, decided by the Court of Appeals, 23 N. Y. 298, the validity of three clauses of the will of one William Barthrop were involved. Although attention is invited to the case, for it is distinguished for research, learning, and an exhaustive discussion of the questions involved, we will here notice only so much of the decision as applies to the clause of the will providing for a dispensary.

This clause reads as follows: "After the expiration of ten years, or sooner, if my executors find that there will be sufficient funds, I would wish a public dispensary, as in New York, on a similar plan, for indigent persons, both sick and lame, to be attended by a physicain elected to the establishment, at their own houses, and also daily at the dispensary; my executors to consult judicious men in Albany, respecting the same, and funds enough to carry on the building and yearly expenses."

The executors, upon the will being probated, renounced the trust and refused to execute the same. The court of appeals in this case held that it would have been competent for the executors, whom the testator had selected to execute his trust and had clothed with discretionary power over omitted details in his scheme of charity, to have carried out the trust, but that they having renounced the trust, the same was so uncertain that it could not be administered by judicial authority. COMSTOCK, J., who delivered the opinion of the court, said: "By that provision the testator declared

that he 'would wish a public dispensary, as in New York, upon a similar plan, for indigent persons, both sick and lame, to be attended by a physician elected to the establishment, at their own houses, and also daily at the establishment; my executors to consult judicious men in Albany respecting the same, and funds enough to carry on the building and yearly expenses.' According to one construction of this clause—a construction certainly plausible—a discretion was reposed in the executors to determine the location of the proposed establishment, its extent and particular characteristics, and the amount of funds to be devoted to the object. The actual exercise of that discretion by those in whom it was confided might, by rendering uncertain certain, relieve the bequest from the objections arising out of its vague and indefinite character. The will of a testator may be ascertained by the acts of those to whom he has entrusted discretion and power. Such acts may be justly regarded as the definite expression of his own purpose. But in this view of the present question, the objections encountered are that the discretion was personal to the individuals appointed to be executors, and that they renounced the trust. * * * If, taking another view of the provision in question, we say that the executors were not appointed to be the authors of a scheme for the proposed dispensary with discretionary powers as to the amount of endowment and other circumstances, we shall find the difficulties still more obvious. All that we can learn from the language of the testator is, that he had in his mind a vague and shadowy conception of a dispensary, similar to those in the city of New York, without any determinate views as to the place of its foundation, the mode of perpetuating and governing it. * * Putting aside, as we do now, the idea of a delegated discretion which might cure these defects, there are wanting all the elements of certainty which are necessary to impart validity to this bequest. There is a fatal uncertainty both as to the subject and the object of the bequest."

The learned judge, after deciding the clause of the will

relating to the dispensary void for uncertainty, enters into an elaborate argument, showing that the English law on this subject is not the law in this country. As in the case at bar, in the above case the beneficiaries were not designated. It differs from this case, however, in this, that the scheme or plan by which the charity was to be carried out is in a great degree defined. A public dispensary was to be erected, on the same plan as similar institutions in the city of New York, at which the sick and the lame were to be attended by a physician elected to the establishment, at their own homes, and also daily at the establishment, yet the court of appeals held the charity to be too indefinite for judicial administration in the absence of trustees with delegated discretion to supply omitted details, such as the selection of a location for the proposed establishment, its extent, and the amount of funds to be devoted to it. The case was much stronger in favor of the charity than the one under consideration. We have presented the above cases as illustrations of the degree of the certainty necessary to constitute a valid charity. We claim that they establish these principles: If the charity does not fix itself upon any particular object, but is general and indefinite, such as the promotion of the moral and intellectual condition of a race, or the relief of the poor, and no plan or scheme is prescribed, and no discretion is lodged by the testator in certain and ascertainable individuals, it does not admit of judicial administration. In such a case in England the administration of the charity is cast upon the King to be executed *cy pres*, while in this country the property devised lapses to the next of kin. If, however, in such a case certain and ascertainable trustees are appointed, with full powers to select the beneficiaries and devise a scheme or plan of application of the funds appropriated, the court will, through the trustees, execute the charity.

If a scheme is prescribed, such as the foundation of a school, with clear and specific directions as to its government and the application of the funds appropriated, the charity will be sustained by the court.

If a devise is made to an association, voluntary or corporate, having its board of trustees and organized for a known and legal purpose, such as a church, or a theological institute, the law will presume that the testator intended that the trustees or regents of such association should administer the charity in furtherance of the purpose of such association, and, when necessary, select the beneficaries. See *Bridges* v. *Pleasants*, 4 Ired. Eq. 26.

In *Lepage* v. *McNamara*, 5 Iowa, 124, it was held, that, "there is, in general, the same necessity for a *cestui que trust*, capable of taking the beneficial interest, and so defined and pointed out as that there shall be no uncertainty, as there is for a properly defined grantee in a deed. *Gallego's Ex'rs.* v. *Attorney General*, 3 Leigh, 450. If there is such uncertainty, as that it cannot be known who is to take as beneficiary, the trust is void; and the heir, by operation of law, will take the legal estate, stripped of the trust."

A devise for the use of the schools among the inhabitants of the north-west parish of Boxford is void for uncertainty. *Barker* v. *Wood*, 9 Mass. 419.

A devise, "I give my farm in Pomfret to the yearly meeting of people called Quakers of New England, the net income to be appropriated in aid of the charitable fund of the boarding school established by Friends in Providence." In an action of ejectment by the heirs at law, it was held, first, that the individuals composing the meeting did not take; second, that the yearly meeting as a voluntary association did not take; third, that they could not take as a corporation unless expressly authorized by their charter; fourth, that the devise could not be sustained as a charity; fifth, that the subject devised descended to the heirs at law. *Greene* v. *Dennis*, 6 Conn. 293.

In *Wheeler* v. *Smith*, 9 How. U. S. 55, it was held, that a bequest to trustees for such purposes as they consider might prove to be most beneficial to the town and trade of Alexandria was void.

In *Kelley* v. *Kelley*, 25 Penn. St. 460, it was held that a will which contains no intelligible devise or bequest is void.

In *Trippe* v. *Frazier*, 4 Har. & Johns. 446, it was held that a bequest to the real distressed poor of Talbot county, Maryland, was void for uncertainty.

In *Wilderman* v. *City of Baltimore*, 8 Md. 551, it was held that a devise to the city of Baltimore, in trust for the relief and support of the indigent poor persons who may from time to time reside in the twelfth ward of said city, was void, as being too vague and indefinite, and the property vests in the next of kin, or residuary legatee; and their rights vesting immediately, it is not competent for the legislature to divest them by a subsequent act.

In *Morse* v. *Carpenter*, 19 Vt. 513, it was held, that a devise to the poor or a deed to the poor of a parish is void for vagueness and uncertainty. The court say: "These, and the like cases, furnish illustrations in reference to the grantee, of the *ambiguitas patens*, strictly so called, an ambiguity not removable by construction, nor to be explained by evidence *aliunde*, without making more, or less, of the instrument than its terms import."

In *Gallego's Ex'rs* v. *Attorney General*, 3 Leigh. 450, it was held, that a devise to executors, to lay by two thousand dollars to be distributed among needy poor and respectable widows was uncertain as to beneficiaries, and void.

A bequest, "I leave the whole of said funds in the hands of my executor, to be applied by him to the support of the missionaries in India, under the direction of the general assembly board of missions of the Presbyterian Church," is void for uncertainty. *Presbyterian Church* v. *White*, Phila. Law Reg. 526.

A devise to the Education Society of Virginia, for the benefit of theological students at the seminary near Alexandria, is void for uncertainty. Opinion of Taney, *supra*.

In *Bridges* v. *Pleasants*, 4 Ired. Eq. 26, it is held, that a bequest for religious charity must be to some definite purpose, or to some body or association of persons, having a legal existence and with capacity to take.

In *Morice* v. *Bishop of Durham*, 9 Ves. 399, 10 Ves. 522, it was held, that a gift to the bishop, "to be disposed of to such objects of benevolence and liberality as he should most approve of," was void for its vagueness and generality, inasmuch as no person or persons in particular could claim the benefit of the gift or enforce the bishop to bestow charity upon any person, while it was yet clear that the bishop could not keep it himself. Therefore, the subjects of such gifts result to the heir or next of kin of the donor.

The reasoning of the court in the case of *Dashiell* v. *Attorney General*, 5 Har. & Johns. 392, is so strongly in point in the case under consideration, that we reproduce the statement of the case and the opinion of the court upon the question of vagueness and uncertainty. The court say: "It is an admitted general principle, that a vague bequest, the object of which is indefinite, cannot be established in a court of equity. Is this a bequest of that description? We think it clearly is. The testator, by his will, appointed the appellant, George Dashiell, and Henry Downes, trustees of his estate, and the guardians of his only child, with instructions to his executors to pay over to them the annual income of his estate, to be by them appropriated according to the provisions of the will, which, after providing, among other things, for the payment of his debts, and the support and education of his daughter, directs the residue of the income of his estate, 'to be equally divided, one half to be applied towards feeding, clothing, and educating the poor children belonging to the congregation of Saint Peter's Protestant Episcopal Church in the city of Baltimore,' &c., with certain provisions for the eventual increase or decrease of the fund so set apart for that purpose. Who are 'the poor children belonging to the congregation of Saint Peter's Protestant Episcopal Church in the city of Baltimore?' No court can know or have the means of ascertaining; and the description of the *cestui que trust* is so vague, that none can be found who, upon the general principles of equity, can entitle themselves to the benefit of the trust."

The court, after reviewing the case of *Morice* v. *Bishop of Durham, supra,* and discussing the doctrine of discretion vested in trustees, says: "But no such power is given; the trustees are directed to appropriate the fund entrusted to them, to the feeding, clothing, and educating the poor children belonging to that congregation, not such as they might select, and without any right or power to discriminate; and there is no difference whether a devise or bequest be immediate to an indefinite object, or to a trustee for the use and benefit of an indefinite object. If it be immediate to an indefinite object, it is void; and if it be a trust for an indefinite object, the property that is the subject of the trust is not disposed of, and the trust results for the benefit of those to whom the law gives the property in the absence of any other disposition of it by the testator or donor."

The principles enunciated in the above case are the same as in *White* v. *Fisk, supra,* and *Beekman* v. *Bonsor, supra,* and many other of the adjudicated cases referred to, and are directly in point in the case under consideration. In the above case the decision was made to turn upon the fact that the bequest was to all the poor belonging to a certain church and that there was no power given to select the beneficaries from the class or discriminate between them. In *Fontain* v. *Ravenel, supra,* and in *Beekman* v. *Bonsor, supra,* the trust was defeated because there was no declared will of the testator, but only a vague and indefinite intention declared or wish expressed. In *White* v. *Fisk* the ruling was based upon the fact that there was "no rule of determination, selection, or appointment furnished by the will, and no positive or discretionary power of determination bestowed."

In the case of *White* v. *Fisk* the beneficiaries were described as the pious young men preparing for the ministry in New Haven. In *M'Cord* v. *Ochiltree* they are described, as pious, indigent youths preparing for the ministry of the gospel according to a peculiar order of faith. In *Dashiell* v. *Attorney General* they are described as "the children belonging to the congregation of Saint Peter's Protestant Epis-

copal Church in the city of Baltimore," while in the case under consideration they are described as "the colored children, both male and female, of the colored race," without any power of determination, selection, discrimination, or appointment, except that the trust is to be executed in "such way and manner as they may deem best, of which a majority shall determine."

In *Dashiell* v. *Attorney General*, it is said that "there is no difference whether a devise or bequest be immediate to an indefinite object, or to a trustee for the use and benefit of an indefinite object."

If the devise or bequest, in the case under consideration, had been made directly to the beneficiaries therein named, without the intervention of trustees, would any one maintain that it could be sustained? We presume that every one learned in the law would admit that it would be void for vagueness and uncertainty.

It was held in *White* v. *Fisk* and *Bridges* v. *Pleasants*, *supra*, that "each one of those falling within the description named has an equitable or beneficial interest in the fund, and which he must have the right to enforce if any can."

Let us apply these principles to the case under consideration. The trust created is in favor of the colored children, both male and female, of the colored race. We have adopted the theory of the learned counsel for the appellants, that the testator intended that his beneficiaries should be selected from the children of the African race residing in the United States. We know historically that there are about four millions of that race within the states and territories of the United States, and that they are scattered over a vast extent of territory, from the lakes in the north to the gulf of Mexico in the south, and from the Atlantic to the Pacific.

If it is true that each one falling within the description named has an equitable or beneficial interest in the fund, and one which he has the right to enforce, does it need any

argument or illustration to demonstrate that it will be impracticable, nay impossible, to execute the trust?

If it is true, as we have tried to demonstrate, that under the will, the trustees have no power or discretion to select the beneficiaries from the class designated, does it not logically and unavoidably result that the devise must be held void for its vaguenes and uncertainty? Viewing the matter in either aspect, it is quite obvious to us that it will be impracticable and impossible to execute the trust.

The cases cited by the counsel for the appellants are, in general, readily distinguishable from the one under consideration. In some of the cases the objects and purposes of the charity were defined, and the mode of its application prescribed with precision. In others, where the purpose of the charity was general, trustees were appointed, who were in existence, ascertainable, and competent to act, with plenary discretion to speak for the testator after his death. In others, the charity was bestowed upon organized associations, voluntary or corporate, having boards of trustees or regents.

The principal case relied upon by the counsel for the appellants is *M'Cord* v. *Ochiltree*, 8 Blackf. 15. That case was this: John Ochiltree died in 1840, testate. By his last will and testament, among other bequest, he made the following: "After paying all the foregoing bequests, I give and bequeath unto the Theological Seminary at South Hanover, in the State of Indiana, all the remainder of my estate, to continue a permanent fund, and the interest to be applied to the education of pious, indigent youths who are preparing themselves for the ministry of the gospel, and those only who strictly adhere to the Westminster confession of faith in its literal meaning."

When the testator made his will, and when he died, the theological seminary referred to was organized and regularly conducted under the management of directors appointed for that purpose. Now, in this bequest there was no uncertainty whatever, except that the beneficiaries were not designated by

name, but were referred to as a class and designated as pious, indigent youths. The intention of the testator is manifest as to who should select the beneficiaries, the kind of education to be given, and the particular seminary at which it should be given. The devise was to a certain theological seminary, then organized and regularly conducted. It was clearly the intention of the testator that the beneficiaries should be selected by the directors of that seminary, should be there educated, and that the education received should be theological, as it was exclusively a theological seminary. We have then here, not only certain and ascertainable persons to select the beneficiaries, but the kind of education is prescribed, and the instrumentality by which the charity should be carried into effect is already pointed out. Judge DEWEY, when he penned his opinion, very clearly appreciated the importance of these facts; for he carefully makes these statements: "All the operations of the theological seminary were to be conducted on the principle of a strict adherence to the standard of the Presbyterian church in its obvious meaning. * * From its first establishment at South Hanover, until its incorporation, the seminary was always organized under the management of directors appointed for that purpose." This forms the distinguishing feature between the case of *M'Cord* v. *Ochiltree* and *White* v. *Fisk*. In other respects the cases are parallel.

Chief Justice CHURCH, when he delivered the decision in *White* v. *Fisk*, appreciated the importance of this difference between the two cases, as appears from the following passages in that decison: "This legacy is not given to any college or institution, nor to any association of persons corporate or voluntary, nor is any such alluded to, by which the charity can be dispensed. * * * If a bequest for the purpose indicated in this will, in this respect, had been made to a college, a theological institute, the congregational society of which the testator was a member, or other body which had, or might have, a supervision or interest in the general welfare of this charity, and rules for its management, it

would have presented a very different case. * * * There is a class of cases, the authority of which we recognize, where the individual beneficiaries under a will, but included in a definite class, are left uncertain, and yet the bequest for their benefit has been sustained. But these are cases where the gift has been to some corporate or voluntary association, whose duty and business it becomes to dispense the charity."

The force of this distinction is acknowledged by DEWEY, J., in *Bartlet* v. *King*, 12 Mass. 537. He says: "The second point made by the defendant's counsel is, that the bequest is void for uncertainty. * * It is manifest that the legacy is not given to the plaintiffs, but in trust for the use of others; and it is said on the part of the defendant, that the trust, or the persons who are entitled to the benefit of it, as *cestui que trust*, are altogether uncertain. If this be so, the bequest is undoubtedly void. * * It then becomes necessary to inquire, who are the persons to whose use the plaintiffs claim the legacy under the will of the testatrix? They are not described by their proper names, nor by the name of any corporate body; but they are called 'The American Board of Commissioners for Foreign Missions and their associates.'

"The persons who at the time of executing the will constituted the board and their associates, if they can be ascertained, are the persons for whose use the legacy was intended; not for their personal and individual benefit, but as trustees to apply the proceeds of it to the purposes of the board, and to promote the pious objects for which it was established. It is not necessary that a legatee be named. If he is otherwise clearly described, it is sufficient. * * * If the persons who constitute the American Board of Foreign Missions are certain and known by that description, we then have as much certainty with regard to the persons to whom the plaintiffs are to pay over the interest and income of the legacy as if they had been expressly named in the will. For this we must recur to the facts agreed by the parties; and by them it is admitted that such a board was in existence,

consisting of nine persons, and known to the testratrix at the time of executing her will."

Now, it will be observed that this case turned upon the ground that the persons composing the American Board of Foreign Missions were ascertainable, and that therefore the case fell within the maxim, *id certum est, quod certum reddi potest.* It is expressly stated that had they not been ascertainable persons the charity would have failed.

In that case the existence of the association was admitted, and that the persons composing it were known to the testator. In the case under consideration the complaint avers, and the demurrer admits, that no such association as the "orthodox protestant clergymen of Delphi" ever did exist.

In that case the beneficiaries are so described that it was as easy to ascertain who were intended as though they had been expressly named, while in this case the beneficiaries are designated only as a class of persons belonging to four millions of their race in this country.

We, therefore, hold that the residuary devise and bequest is void at law, and cannot receive a judicial enforcement by a court of chancery possessing the ordinary powers of a court of equity.

It is claimed by the appellants, that while the bequest under consideration may be void at law, on the ground of uncertainty as to the recipients of the charity and the want of trustees to execute the trust, it will be sustained in equity. It is admitted by the appellees that the bequest under consideration would be sustained and executed in England. It is claimed by the appellants that the courts of chancery in this State possess all the powers of the court of chancery in England. It is maintained by the appellees that the courts of chancery in this State possess none but judicial power, that they posses no prerogative power, such as the Chancellor of England does, and which is derived from the King; that the *cy pres* power is not judicial, but a royal prerogative, exercised under the sign-manual of the King. It is also maintained by the appellants that the statute of 43 Eliza-

beth created new rights and conferred new powers on the courts of chancery; while it is contended by the appellees that such statute created no new rights, but provided new and different remedies.

The solution of these various controverted points depends upon five propositions: First, are the powers possessed by the court of chancery in England, in reference to charitable uses, exercised in virtue of the prerogative power, and not as a part of the jurisdiction inherent in a court acting as a court of equity? Second, was this prerogative derived directly from the King under his sign-manual, or was it conferred on the court by the statute of 43 Elizabeth, known as the statute of charitable uses? Third, is the *cy pres* a judicial or prerogative power? Fourth, do the courts of chancery in this State possess any prerogative power? Fifth, in what manner, and to what extent, can the courts of chancery in this State execute the statute of 43 Elizabeth?

We will discuss these propositions in the order stated. TANEY, Ch. J., in *Fontain* v. *Ravenel* 17 How. U. S. 369, says: "But the power which the chancellor exercises over donations to charitable uses, so far as it differs from the power he exercises in other cases of trust, does not belong to the court of chancery as a court of equity, nor is it a part of its judicial power and jurisdiction. It is a branch of the prerogative power of the King as *parens patriæ*, which he exercises by the chancellor."

This great and learned judge in the same opinion says: "Resting my opinion upon the English authorities above referred to, and upon the emphatic language just quoted from the decision of this court, I think I may safely conclude that the power exercised by the English court of chancery in enforcing donations to charitable uses, which would not be valid if made to other uses, is not a part of its jurisdiction as a court of equity, but a prerogative power exercised by that court." See, to the same effect, *The Baptist Association* v. *Hart's Ex'rs*, 4 Wheat. 1; 3 Bl. Com. 49; *Vidal* v. *Girard's Ex'rs*, 2 How. U. S. 127; *M'Cord* v. *Ochiltree*, 8 Blackf. 15.

There has been much discussion and diversity of opinion as to the second proposition. TANEY, C. J., in *Fontain* v. *Ravenel, supra,* says: "In the cases in relation to charities which have come before this court, there has been a good deal of discussion upon the question, whether the power of the chancery court of England was derived from 43 Elizabeth, or was exercised by the court before that act was passed. And there has been a diversity of opinion upon the subject in England, as well as in this country. In the case of the *Baptist Association* v. *Hart's Ex'rs,* Chief Justice MARSHALL, who delivered the opinion of the court (see 4 Wheat. 49), and Mr. Justice STORY, who wrote out his own opinion. and afterwards published it in the appendix to 3 Pet. Rep. 497, were both at that time of opinion that it was derived from the statute. But in *Vidal* v. *Girard's Ex'rs,* 2 How. U. S. 127, Mr. Justice STORY changed his opinion, chiefly upon authority of cases found in the old English record which had been printed a short time before by the commissioners on public records in England. It appeared from these records that the power had been exercised in many cases long before the statute was passed."

In case of the *Baptist Association* v. *Hart's Ex'rs,* 4 Wheat. 1, MARSHALL, C. J., says: "We now find this prerogative employed in enforcing donations to charitable uses, which would not be valid if made to other uses, in applying them to different objects than those designated by the donor, and in supplying all defects in the instrument by which the donation is conveyed, or in that by which it is administered."

In *Vidal* v. *Girard's Ex'rs, supra,* Mr. Justice STORY, in speaking for the court says: "But what is still more important, is the declation of Lord REDESDALE, a great judge in equity, in the *Attorney General* v. *Mayor of Dublin,* 1 Bligh R. 312, 347, (1827) where he says, 'We are referred to the statute of Elizabeth with respect to charitable uses, as creating a new law upon the subject of charitable uses. That statute only created a new jurisdiction, it created no new law. It created a new and ancillary jurisdiction, a jurisdic-

tion created by commission, &c., but the proceedings of that commission were made subject to appeal to the lord chancellor, and he might reverse or affirm what they had done, or make such order as he might think fit for reserving the controlling jurisdiction of the court of chancery as it existed before the passing of that statute; and there can be no doubt that by information by the Attorney General the same thing might be done.' He then adds, 'the right which the Attorney General has to file an information is a right of prerogative. The King, as *parens patriæ*, has a right, by his proper officer, to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in cases of charities and other cases.'" Mr. Justice STORY after referring to many cases that were decided before the passage of the act in question, says, "Whatever doubts, therefore, might properly be entertained upon the subject when the case of the *Trustees of the Philadelphia Baptist Association* v. *Hart's Ex'rs*, 4 Wheat. 1, was before this court, (1819) those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded."

DEWEY, J., in *M'Cord* v. *Ochiltree*, *supra*, says, "The jurisdiction of the English court of chancery has several branches, and is derived from various sources. The most important branch of its power is that general one which it exercises as a court of equity, in common with the court of exchequer; but besides this extensive equity jurisdiction it has other powers which are peculiar to itself. Of these powers it will be necessary, on the present occasion, to notice but one, that which is delegated to it by the crown as *parens patriæ*. Within this branch of its jurisdiction is classed the superintendence of infants, idiots, lunatics and certain charities."

There are many other authorities to the same effect, but we do not deem it necessary to refer to them, as those produced fully demonstrate that the power under discussion

was a prerogative power, and was not conferred by the statute of 43 Elizabeth.

It is so well settled by adjudicated cases, both in England and in this country, that the *cy pres* power as possessed and exercised by the courts of chancery in England was derived directly from the king and constituted a part of the prerogative power, that it is not deemed necessary to refer to authorities.

The fourth proposition is, do the courts of chancery, as constituted and existing in the State of Indiana, possess and can they exercise the prerogative power that is possessed and exercised by the court of chancery in England?

By our State constitution, the judicial power of the State is vested in a Supreme Court, in circuit courts, and such inferior courts as the General Assembly may establish. Sec. 1, article 7.

The constitution of the United States provides, that, "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time order and establish." Sec. 1, article 3.

Mr. Chief Justice TANEY, in *Fontain* v. *Ravenel, supra,* says: "The constitution of the United States, as I have before said, grants only judicial power at law and in equity to its courts; that is, the powers at that time understood and exercised as judicial, in the courts of common law and equity in England. And it must be construed according to the meaning which the words used conveyed at the time of its adoption; and the grant of power cannot be enlarged by resorting to a jurisdiction which the court of chancery in England, centuries ago, may have claimed as a part of its ordinary judicial power, but which had been abandoned and repudiated as untenable on that ground, by the court itself, long before the constitution was adopted."

Mr. Justice McLEAN, in speaking for the court, in *Fontain* v. *Ravenel, supra,* says: "The courts of the United States cannot exercise any equity powers, except those conferred by acts of Congress, and those judicial powers which

the high court of chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised at the time of the formation of the constitution of the United States. Powers not judicial, exercised by the chancellor merely as the representative of the sovereign, and by virtue of the king's prerogative as *parens patriæ*, are not possessed by the circuit courts."

Mr. Willard, in his Equity Jurisprudence, says: "The reason is that we have no magistrate clothed with the prerogatives of the crown, and our courts of justice are entrusted only with judicial authority."

In the case of *Moore's Heirs* v. *Moore's Devisees and Executors*, 4 Dana, 354, Mr. Chief Justice ROBERTSON, speaking for the court, says: "And we do not admit that the commonwealth as *parens patriæ* can rightfully interfere unless there be an escheat to her; and then she may become the absolute and beneficial owner. Rights here are regulated by law; and if any person have a claim to property ineffectually dedicated to charity, the commonwealth has no prerogative right to decide on that claim and dispose of the property as the King of England has been permitted to do."

In *Williams* v. *Williams*, 4 Seld. 525, DENIO, J., said: "I concede the English doctrine is in force here only so far as it is adapted to our political condition. In that class of cases, therefore, where the gift is so indefinite that it cannot be executed by the court, * * * * the claim of the representatives of the donor must prevail over the charity. The reason is, we have no magistrate clothed with the prerogatives of the crown, and our courts of justice are entrusted only with judicial power."

In *Beekman* v. *Bonsor*, 23 N. Y. 298, COMSTOCK, C. J., says: "The *cy pres* power which constitutes the peculiar feature of the English system, and is exerted in determining gifts to charity, where the donor has failed to define them, and in preparing schemes of approximation near to or remote from the donor's true design, is unsuited to our institutions,

and has no existence in the jurisprudence in this State on this subject."

The Court of Errors and Appeal, in the State of New Jersey, in *Thomson's Ex'rs* v. *Norris*, 5 C. E. Green, 489, say: "Is the purpose indicated, then, a charity in a legal point of view? I do not understand that there is any difference whatever between the common law of England and of this State upon the point as to what constitutes the legal definition of a charity. And by this common law I mean that system, so far as respects this question, which has grown up in a series of decisions founded, in part, upon the 43d of Elizabeth, ch. 4 (the statute of charitable uses). The doctrine of the English court of chancery with regard to the mere classification of things which are, and those which are not charities, in the eyes of the law, has been very generally recognized in this country. The discrepancy between the English and American systems regulating charities consists in this, that in England a bequest for a charity will be effectuated, no matter how uncertain the objects or the persons may be, or whether the bequest can be carried into exact execution or not; for when a literal execution becomes impracticable, the court will administer it on the doctrine of *cy pres*. In some instances the courts of this country have refused to exercise so extensive a jurisdiction. I am not aware that in our own courts this subject has received any elucidation. It may well be, therefore, that a bequest, obviously for a charity, and which in England would be carried into effect, might not be enforced in our own courts, on the ground of the indefiniteness of its objects or the impracticability of its execution. But this is a diversity of legal administration, and not of legal classification. Upon the questions what is, or what is not, a charitable use, we have no criterion but the rules of the common law, and those rules, consequently, are obligatory upon us."

The Supreme Court of Iowa, in the case of *Lepage* v. *McNamara*, 5 Iowa, 124, say: "It will hardly be profitable to institute an inquiry into the analogy between the present

case and those in which the chancellor in England, by the application of the civil law doctrine of *cy pres*, gives effect to gifts and devises, where only a general purpose of charity is manifested; or where either the prescribed object, or the mode of applying it, has failed or become impracticable; or another class of cases, where no particular object is designated, and no trustee named, or person appointed, to select the object, and which are administered by the chancellor under the prerogative power, and by virtue of an appointment of the Crown, as *parens patriæ*. In either class of cases, unless the donor manifest an intention to restrict his bounty to some general object of charity, embraced by the statute of 43 Elizabeth, chap. 4, the legacy or gift will be void, and neither the King nor the chancellor can make any application of it. *Moggridge* v. *Thackwell*, 7 Vesey, 75.

"Our courts of chancery have no other than judicial power, and consequently have no jurisdiction in the second class of cases above enumerated. The state cannot interfere as *parens patriæ*. If a testator ineffectually dedicates his property to charity, or in such a manner that the devise is void, the state has no prerogative right to interfere and dispose of the property, as the King of England has been permitted to do. *Attorney Gen.* v. *Utica Ins. Co.* 2 Johns. Ch. 386–7; *Moore's Heirs* v. *Moore's Devisees*, 4 Dana, 366. Even in England, it has been held that the chancellor, as a judge in equity, could not enforce a charitable trust, if, according to the rules of the common law, it was either illegal or void for indefiniteness or vague generality. Nor could he, as such, apply the charity to any other purpose than that designated by the donor. He must be governed by the principles of the common law respecting trusts, adopted from the civil law. Neither the Crown, nor the chancellor under his delegated authority, could enforce or appropriate a charitable legacy or gift which was not valid. Prerogative itself could not violate the private legal rights of those who, by operation of law, were entitled to property which had been

illegally dedicated to charity. See *Baptist Association* v. *Hart's Executors*, 4 Wheat. 1; *Moore's Heirs* v. *Moore's Devisees, supra.* In the case last cited, ROBERTSON, C. J., delivering the opinion of the Court, says: 'We are satisfied that the *cy pres* doctrine of England, is not, or should not be, a judicial doctrine, except in one kind of case; and that is, when there is an available charity to an identified or ascertainable object, and a particular mode, inadequate, illegal, or inappropriate, or which happens to fail, has been prescribed. In such cases, a court of equity may substitute or sanction any other mode that may be lawful and suitable, and will effectuate the declared intention of the donor, and not arbitrarily and in the dark, presuming on his motives or wishes, declare an object for him.' "

The last proposition is, in what manner, and to what extent, the courts of this State execute the statute of 43 Elizabeth. The General Assembly, on the 31st of May, 1852, passed an act entitled, "An act declaring the law governing this State," which reads as follows:

"SEC. 1. Be it enacted by the General Assembly of the State of Indiana, that the law governing this State is declared to be: First. The Constitution of the United States and of this State. Second. All statutes of the General Assembly of this State, in force, and not inconsistent with such constitutions. Third. All statutes of the United States, in force, and relating to subjects over which Congress has power to legislate for the States, and not inconsistent with the Constitution of the United States. Fourth. The common law of England, and statutes of the British Parliament made in aid thereof, prior to the fourth year of the reign of James the First (except the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seventh Henry the Eighth), and which are of a general nature, *not local* to that kingdom, and not inconsistent with the first, second, and third specifications of this section."

The forty-third chapter of Elizabeth, commonly known as

the Statute of Charitable Uses, is in the words and figures as follows, namely:

"An act to redress the misemployment of lands, goods, and stocks of money, heretofore given to certain charitable uses.

"Whereas lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money, have been heretofore given, limited, appointed and assigned, as well by the Queen's most excellent majesty, and her most noble progenitors, as by sundry other well disposed persons; some for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, sea banks and highways, some for education and preferment of orphans, some for or towards relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftsmen and persons decayed, and others for relief or redemption of prisoners or captives, and for aid and ease of any poor inhabitants, concerning payments of fifteens, setting out of soldiers, and other taxes; which lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money, nevertheless have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver and employ the same: (2) for redress and remedy whereof, be it enacted by authority of this present parliament, That it shall and may be lawful to and for the lord chancellor or keeper of the great seal of England for the time being, and for the chancellor of the duchy of Lancaster for the time being for lands within the county palatine of Lancaster, from time to time to award commissions under the great seal of England, or the seal of the county palatine, as the case shall require, into all or any part or parts of this realm respectively, according to their several jurisdictions as aforesaid, to the bishop of every several

diocese and his chancellor (in case there shall be any bishop of that diocese at the time of awarding of the same commissions), and to other persons of good and sound behavior, (3) authorizing them thereby, or any four or more of them, to enquire, as well by the oaths of twelve lawful men or more of the county, as by all other good and lawful ways and means, of all and singular such gifts, limitations, assignments and appointments aforesaid, and of the abuses, breaches of trusts, negligences, misemployments, not employing, concealing, defrauding, misconverting or misgovernment of any lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money or stocks of money, heretofore given, limited, appointed, or assigned, and which hereafter shall be given, limited, appointed or assigned, to or for any of the charitable and godly uses before rehearsed; (4) and after the said commissioners or any four or more of them (upon calling the parties interested in such lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money) shall make enquiry by the oaths of twelve men or more of the said county (whereunto the said parties interested shall and may have and take their lawful challenge and challenges), (5) and upon such inquiry, hearing and examining thereof, set down such orders, judgments and decrees, as the said lands, tenements, rents, annuities, profits, goods, chattels, money and stocks of money, may be duly and faithfully employed, to and for such of the charitable uses and intents before rehearsed respectively, for which they were given, limited, assigned or appointed by the donors and founders thereof: (6) which orders, judgments and decrees, not being contrary or repugnant to the orders, statutes or decrees of the donors or founders, shall by the authority of this present parliament stand firm and good, according to the tenor and purport thereof, and shall be executed accordingly, until the same shall be undone or altered by the lord chancellor of England, or lord keeper of the great seal of England, or the chancellor of the county palatine of Lancaster, respect-

ively, within their several jurisdictions, upon complaint by any party grieved to be made to them.

"II. Provided always, That neither this act, nor any thing therein contained, shall in any wise extend to any lands, tenements, rents, annuities, profits, goods, chattels, money or stocks of money, given, limited, appointed, or assigned, or which shall be given, limited, appointed or assigned to any college, hall or house of learning within the limits of Oxford or Cambridge, or to the colleges of Westminster, Eaton or Winchester, or any of them, or to any cathedral or collegiate church within this realm.

"III. And provided also, That neither this act, nor any thing therein, shall extend to any city, town corporate, or to any the lands or tenements given to the uses aforesaid within any such city or town corporate, where there is a special governor or governors appointed to govern or direct such lands, tenements, or things disposed to any the uses aforesaid, neither to any college, hospital or free school, which have special visitors or governors, or overseers appointed them by their founders.

"IV. Provided also, and be it enacted by the authority aforesaid, That neither this act, nor any thing therein contained, shall be any way prejudicial or hurtful to the jurisdiction or power of the ordinary, but that he may lawfully in every cause execute and perform the same, as though this act had never been had or made.

"V. Provided also, and be it enacted, That no person or persons that hath or shall have any of the said lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money or stocks of money in his hands or possession, or doth or shall pretend title thereunto, shall be named a commissioner or a juror for any of the causes aforesaid, or being named, shall execute or serve in the same.

"VI. And provided also, That no person or persons which hath purchased or obtained, or shall purchase or obtain, upon valuable consideration of money or land, any estate or interest of, in, to or out of any lands, tenements, rents, annuities,

hereditaments, goods or chattels, that have been or shall be given, limited or appointed to any of the charitable uses above mentioned, without fraud or covin, having no notice of the same charitable use, shall not be impeached by any decrees or orders of the commissioners above mentioned, for or concerning the same, his estate or interest: (2) and yet, nevertheless, be it enacted, That the said commissioners, or any four or more of them, shall and may make decrees and orders for recompense to be made by any person or persons, who, being put in trust, or having notice of the charitable uses above mentioned, hath or shall break the same trust, or defraud the same uses, by any conveyance, gift, grant, lease, demise, release or conversion whatsoever, and against the heirs, executors and administrators of him, them, or any of them, having assets in law or equity, so far as the same assets will extend.

"VII. Provided always, That this act shall not extend to give power or authority to any commissioners before mentioned, to make any orders, judgments or decrees for or concerning any manors, lands, tenements or other hereditaments assured, conveyed. granted or come unto the Queen's majesty, to the late King Henry the Eighth, King Edward the Sixth, or Queen Mary, by act of parliament, surrender, exchange, relinquishment, escheat, attainder, conveyance or otherwise: (2) and yet, nevertheless, be it enacted, That if any such manors, lands, tenements or hereditaments or any of them, or any estate, rent or profit thereof, or out of the same or any part thereof, have or hath been given, granted, limited, appointed or assigned to or for any the charitable uses before expressed, at any time since the beginning of her majesty's reign; That then the said commissioners, or any four or more of them, shall and may, as concerning the same lands, tenements, hereditaments, estate, rent or profit so given, limited, appointed or assigned, proceed to enquire, and to make orders, judgments and decrees, according to the

purport and meaning of this act, as before is mentioned, the said last mentioned proviso notwithstanding.

"VIII. And be it further enacted, That all orders, judgments and decrees of the said commissioners, or any four or more of them, shall be certified under the seals of the said commissioners, or any four or more of them, either into the court of the chancery of England, or into the court of the chancery within the county palatine of Lancaster, as the case shall require respectively, according to their several jurisdictions, within such convenient time as shall be limited in the said commissions.

"IX. And that the said lord chanceller or lord keeper, and the said chancellor of the duchy, shall and may, within their said several jurisdictions, take such order for the due execution of all or any of the said judgments, decrees and orders, as to either of them shall seem fit and convenient.

"X. And that if after any such certificate or certificates made, any person or persons shall find themselves grieved with any of the said orders, judgments or decrees, that then it shall and may be lawful to and for them and any of them, to complain in that behalf unto the said lord chancellor or lord keeper, or to the chancellor of the said duchy of Lancaster, according to their several jurisdictions, for redress therein; (2) and that upon such complaint, the said lord chancellor or lord keeper, or the said chancellor of the duchy, may according to their several jurisdictions, by such course as to their wisdom shall seem meetest, the circumstances of the case considered, proceed to the examination, hearing and determining thereof; (3) and upon hearing thereof, shall and may annul, diminish, alter or enlarge the said orders, judgments and decrees of the said commissioners, or any four or more of them, as either of them in their said several jurisdictions shall be thought to stand with equity and good conscience, according to the true intent and meaning of the donors and founders thereof; (4) and shall and may tax and award good costs of suit by their directions, against such persons as they shall find to complain unto them without just and

sufficient cause of the orders, judgments and decrees before mentioned." Statutes at Large from 1597 to 1660, p. 43; Coke's Second Institute, vols. 3 and 4, 705.

Before a statute of the British Parliament can be in force and constitute a part of the law of this State, under the fourth clause of the above recited act, it must appear that the statute was of a general nature, and not local to the kingdom of Great Britain. If a statute of the British Parliament lacks either of these qualities, it will not constitute a part of the laws of this State. The two things must exist in each statute. If a statute is of a general nature, but is local to that kingdom, it is not in force here.

There can be no doubt that the statute of 43 Elizabeth is of a general nature. The difficult and troublesome question remaining for decision is, whether it is local to that kingdom. It will be observed that the first part of section one declares that twenty-one objects shall be objects of charity; and that lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stocks of money, have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those who should pay, deliver and employ the same.

The section proceeds: "For redress and remedy whereof, be it enacted by authority of this present parliament, that it shall and may be lawful to and for the lord chancellor or keeper of the great seal of England for the time being, and for the chancellor of the duchy of Lancaster for the time being, for lands within the county palatine of Lancaster, from time to time, to award commissions under the great seal of England, or the seal of the county palatine, as the case shall require, into all or any part or parts of this realm, respectively, according to their several jurisdictions, as aforesaid, to the bishop of every several diocese and his chancellor (in case there shall be any bishop of that diocese at the time of awarding of the same commissions), and to other

persons of good and sound behaviour, authorizing them thereby, or any four or more of them, to inquire, as well by the oaths of twelve lawful men or more of the county, as by all other good and lawful ways and means of all and singular such gifts, limitations, assignments, and appointments aforesaid, and of the abuses, breaches of trust, negligences, misemployments, not employing, concealing, defrauding, misconverting or misgoverment of any lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stocks of money, heretofore given, limited, appointed, or assigned, or which shall hereafter be given, limited, appointed, or assigned to or for any the charitable and godly uses before rehearsed."

The section then directs and empowers the said commission to make such orders, judgments and decrees in reference to such lands, &c., as will faithfully employ such lands, &c., to and for such charitable uses and intents as before rehearsed, for which they were given, limited, assigned, or appointed by the donors and founders thereof. These orders, judgments and decrees had to be submitted to the lord chancellor for his approval, who had the power to affirm, set aside, or reverse, in whole or in part.

It is quite plain and manifest to us that all the machinery provided for this new remedy was local to the kingdom of Great Britian, and is wholly unsuited and inapplicable to the condition of things in this country and State. We have no lord chancellor or keeper of the great seal and of the king's conscience. We have no bishop or any other churchman who by virtue of his sacred office sustains any official relation to the government, or is charged with any duty in the administration of justice, as they have in England. The General Assembly of this State has not provided any means, or machinery, as substitutes for the lord chancellor and bishops. It is quite certain that the courts of this State possess no power to appoint such a commission; that if appointed it would have no power to render any order, judgment, or decree; and if such were rendered, they would be absolutely null and void. If this be true, the

courts of this State cannot give a practical and effective enforcement of the remedy provided in the statute under consideration.

In *Owens* v. *The Missionary Society of the M. E. Church*, 14 N. Y. 380, SELDEN, J., says: "This is precisely the class of trusts, as already shown, which gave rise both to informations in chancery in the name of the attorney general, and to the statute of 43 Elizabeth. The remedy afforded by statute has no application in this State; but the remedy by information, so far as it was a common law remedy, is as available here as in England, although it must undoubtedly be modified so as to conform to our different mode of proceeding."

But it is maintained by the appellants that the statute in question created new law, gave new rights, and made new objects of charity. If this position is correct, the statute having been made a part of the law of this State, the courts of this State would possess the power and jurisdiction to enforce those new principles of law and new rights, as they would be of a general nature and not local to the kingdom of Great Britain.

It, therefore, becomes important for us to inquire and determine whether the statute did create new law, confer new rights, and create new objects of charity.

It has been, upon mature consideration, decided by the Supreme Court of the United States, and by the most of the Supreme Courts of the states, that this statute created no new law or new objects of charity, but only provided a new remedy for existing rights. These decisions are fully sustained by the most eminent law writers in this country.

Chancellor KENT says: "It would appear from the preamble of the statute of Elizabeth, that it did not intend to give any new vitality to charitable donations, but rather to provide a new and more effectual remedy for the breaches of those trusts." 2 Kent (11th ed.), 339; *Wilman* v. *Lex*, 17 S. & R. 88; *The Mayor, &c., of Philadelphia* v. *Elliott*, 3 Rawle, 170; *McCartee* v. *The Orphan Asylum Soc.*, 9 Cow. 437;

Moore's Heirs v. *Moore's Devisees*, 4 Dana, 354; *The Ref. Prot. Dutch Church* v. *Mott*, 7 Paige, 77; *Ex'rs of Burr* v. *Smith*, 7 Vt. 241; *Sanderson* v. *White*, 18 Pick. 328; *Wright* v. *Trustees of M. E. Church*, Hoff. 202; *First Bap. Chuch* v. *Witherell*, 3 Paige, 296; *Burbank* v. *Whitney*, 24 Pick. 146.

DEWEY, J., in *M'Cord* v. *Ochiltree*, *supra*, says: "The statute in question we conceive to be in aid of the common law; for though it gave no new jurisdiction to the court of chancery, it enumerated and specified subjects of its cognizance which, prior to its passage, seem to have been involved somewhat in doubt and obscurity."

Such is now the settled law in England. Judge STORY, in delivering the opinion of the court in *Vidal* v. *Girard's Ex'rs*, *supra*, said that Lord REDESDALE was a great judge in equity, and all the legal profession know that this high compliment was eminently deserved.

In *Attorney General* v. *The Mayor, &c., of Dublin*, 1 Bligh N. S, 312, Lord REDESDALE, in delivering the opinion of the House of Lords, said: "We are referred to the statute of Elizabeth, with respect to charitable uses, as creating a new law upon the subject of charitable uses. That statute only created a new jurisdiction; it created no new law; it created a new and ancillary jurisdiction, a jurisdiction borrowed from the elements which I have mentioned, a jurisdiction created by a commission to be issued out of the court of chancery to enquire whether the funds given for charitable purposes had or had not been misapplied, and to see to their proper application; but the proceedings of that commission were made subject to appeal to the lord chancellor, and he might reverse or affirm what they had done, or make such order as he might think fit for reserving the controlling jurisdiction of the court of chancery, as it existed before the passing of that statute; and there can be no doubt that, by information by the Attorney General, the same thing might be done. While proceedings under that statute were in common practice (as appears in that collection which is called Duke's Charitable Uses), you will find it stated, that in certain ca-

ses, although a commission might issue under the statute, an information by the attorney general was the better remedy. In process of time, indeed, it was found that the commission of charitable uses was not the best remedy, and that it was better to resort again to the proceedings by way of information in the name of the attorney general. The right which the attorney general has to file an information is a right of prerogative; the king, as *parens patriæ*, has a right, by his proper officer, to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases; in the case of lunatics, where he has also a special prerogative to take care of the property of lunatics; and where he may grant the custody to a person who, as a committee, may proceed on behalf of the lunatic; or where there is no such grant, the attorney general may proceed by his information." See the authorities on this point heretofore referred to.

It may be regarded as settled by the modern adjudged cases in England and in this country, that the statute of 43 Elizabeth created no new law or new rights, but only created a new jurisdiction, a new remedy by commission; and that the new remedy has no application to this State and can not be enforced by our courts.

Inasmuch as the courts of this State possess no prerogative power and cannot resort to or enforce the remedy provided by the statute of Elizabeth, it necessarily and unavoidably results that they only possess and can exercise judicial functions, such as are possessed and exercised by the court of chancery in England acting as a court of equity.

The American doctrine in relation to charities does not adopt the English doctrine of *cy pres*, only in a modified and very restricted form. It stops where prerogative under the English system begins. It is strictly judicial. It never interposes to hold up, to sustain. It never takes hold of the property, only to apply it when the object is clear, and where the property has been disposed of in the very act that consti-

tutes the charity. Our courts have never permitted the doctrine to go so far as to act in the capacity of *parens patriæ*. They have never taken jurisdiction merely because the donor intended to dispose of a charity, and exercised that jurisdiction merely *in rem;* and perhaps the real distinction between the English and the American doctrine can be stated in that way. The American courts limit their jurisdiction to matters purely *in personam*. When the persons or parties are uncertain, vague, or not in existence, or incapable of holding or taking, they say that the property has never been disposed of, and remains in the donor or his heirs. Thus they require parties or objects to be pointed out, with reasonable clearness, and to be in existence, or capable of being brought into existence by trustees; and they exercise jurisdiction merely in aid of existing parties and objects, or in creating the subject-matter of the charity through the trustees. Their action is *in personam*.

The English court of chancery, finding property dedicated to some charitable use, operates upon the property, and can hold on to it, and retain it, seeking the object described, or an approximate object; and if it finds that the object intended is not in existence, or cannot hold, it still retains the property, and disposes of it for some charitable purpose. It operates upon the *rem*. The American courts confine their doctrine to the execution of a grant or gift that was complete, and perfect, and capable of execution at the moment of its creation. They hold the *rem* only to execute the intention where that intention is complete and capable of execution by the very terms of the grant or trust.

The abuses and dangers of the English system are presented with great force and clearness by Judge SELDEN, in delivering the opinion of the court in the case of *Owens* v. *The Missionary Society of the M. E. Church*, 14 N. Y. 380, where he says: "There is little in the history of charitable uses in England to encourage the courts of this country in violating the ordinary rules of law in their efforts to sustain a particu-

lar class of trusts. All partial legislation and strained judicial construction in favor of particular interests tend to disturb that social equality which general and uniform laws, operating in connection with the natural impulses of men, are calculated to produce. Thus, the law of charitable uses in England found its appropriate *finale* in the statute of 9 George 2, ch. 36, which cut off all such uses, if charged in any way upon lands, unless created by deed twelve months before the death of the donor. The statute of Geo. II. enacted to remedy an increasing public mischief arising from improvident alienations or disposition to uses called charitable uses is not in force here, though such legislation might well be expected should we feel called upon to enforce the original statute. Under that amendment the residuary devise and bequest in this case would be void, because the testator was in a languishing, if not dying condition when the will was made, and died within three days thereafter. We do not feel called upon to enforce the original statute by a strained construction of the power and jurisdiction of our courts, where that statute has been so materially amended and the amendment is not in force here. Our courts could only execute the original statute, if it could be executed at all, while in England many of the abuses that had grown up under that statute have been remedied.

We lay down the following principles of law as applicable to the case under consideration, and which are clearly deducible from the foregoing authorities.

1. The jurisdiction of the English Court of Chancery has several branches, and is derived from various sources. The most important branch of its power is that general one which it exercises, under and in virtue of its judicial capacity, as a court of equity, in common with the court of exchequer; but besides this extensive equity jurisdiction, it has other powers which are peculiar to itself. Of these powers, the most important and extensive are the prerogative powers, which are not judicial, but are exercised by the lord chancellor merely as the representative of the sovereign, and by virtue of the King's

prerogative as *parens patriæ.* The third and remaining branch of its jurisdiction was created and conferred upon the lord chancellor as the keeper of the great seal and of the King's conscience, by the statute of 43 Elizabeth, known as the statute of Charitable Uses, which created a new and ancillary jurisdiction by commission to be issued out of the high court of chancery, to enquire whether the funds given for charitable use had or had not been misapplied, and to see to their proper application.

2. That this prerogative power is derived directly from the king and under his sign-manual, and was not conferred by the statute of forty-third Elizabeth, known as the statute of Charitable Uses.

3. That the statute of 43 Elizabeth created no new law upon the subject of charitable uses, but simply defined what objects are included in the term charities, and only created a new and ancillary jurisdiction, a jurisdiction created by a commission to be issued out of the Court of Chancery, to enquire whether the funds given for charitable purposes had or had not been misapplied, and to see to their proper application; but the proceedings of that commission were made subject to appeal to the lord chancellor, and he might reverse or affirm what they had done, or make such order as he might think fit for reserving the controlling jurisdiction of the Court of Chancery, as it existed before the passing of that statute; that the persons selected and the machinery provided for the enforcement of the new remedy were local to the kingdom of Great Britain, and have no existence in this State, and are wholly unsuited to our laws, institutions, and modes of administering justice; that the General Assembly having failed to provide any mode or machinery for the exercise of the new jurisdiction created by the said statute, the courts of this State possess no power or means of executing or enforcing the remedy provided by such statute; and that as the said statute created no new law, nor conferred new rights, and as the remedy provided was local to the kingdom of Great Britain, and is wholly unsuited and inap-

plicable to our laws and institutions, the power and jurisdiction of our courts over charitable uses have not been increased or enlarged by the said statute.

4. That the prerogative power exercised by the court of chancery in England was conferred on such court by the king, who claimed to be the father of all his subjects, and as such had the power and right to direct and control the lord chancellor, who was the keeper of the great seal and of the king's conscience, in the protection and enforcement of the rights of such of his subjects as were unable to protect themselves.

5. That in this country the people are the true and legitimate possessors of all power; that when they created the federal government they did not confer on such government any prerogative power; that if such power exists in the people, it was retained by them in their sovereign capacity; that the people of this State retain all the power that was not delegated to the federal or state governments; that it is expressly declared in our State constitution that the judicial power of the State shall be vested in a Supreme Court, in Circuit Courts, and in such inferior courts as the General Assembly may establish, and that such courts shall have such civil and criminal jurisdiction as may be prescribed by law; that the General Assembly has only conferred upon the courts of this State judicial power and functions; that the courts of this State having no prerogative power, and being incapable of administering and enforcing the remedy provided by the statute of charitable uses, they only possess judicial power, and can only exercise, in reference to charitable uses and trusts, such power and jurisdiction as was and is possessed and exercised by the court of chancery in England acting as a court of equity.

6. That a devise or grant to a corporation capable of holding, or to a person or persons, either by name or so described that they can be readily ascertained, for a definite and specific use, is good at law; and the powers of a court of chancery are confined to the mere execution of the trust,

to secure the faithful application of the fund or property to the use and object indicated in the deed or will; in other words, to carry out the intention of the grantor or testator, as thus expressed.

7. To constitute a charitable use, there must be a donor, a trustee competent to take, a use restricted to a charitable purpose, and a definite beneficiary. In case of a grant or demise, where there is no party or parties designated who can take the property, or where they are so uncertain that the court cannot direct intelligently the execution of the trust, the property remains undisposed of, and falls to the heir or next of kin. A court of chancery, always acting for the beneficiaries, stops the instant it ascertains that there are none, or that they are so uncertain that it will have to act in the dark when it sets about the application of the trust.

8. That the jurisdiction of the court of chancery is not to create a trust. Its powers in this country are merely to direct the execution of the donor's intention, and to prevent the object from being deprived of the benefit intended. The court in all its doings represents the persons, institutions, and classes who are to be benefited. It is for the beneficiaries alone that the court interposes; and when invoked by the trustees, it is only that they require the interposition of the court to effect the purpose, and to secure to the beneficiaries the charity of which they should be the just recipients.

9. That the *cy pres* power, which constitutes the peculiar feature of the English system, and is exerted in determining gifts to charity where the donor has failed to define them, and in framing schemes of approximation near to or remote from the donor's true design, is unsuited to our institutions, and has no existence in the jurisprudence of this State on this subject.

10. That a gift to charity is maintainable in this State, if made to a competent trustee, and if so defined that it can be executed as made by the donor by a judicial decree, although the beneficiaries are not designated by name or specifically

pointed out, if the trustee is invested with full and ample discretion to select the beneficiaries of such charity from the class of persons named; but where the beneficiaries are described, as in this case, as the children, both male and female, of the African race in the United States, and where such race consists of about four millions, it will be impracticable to ascertain the beneficiaries, and distribute the proportionate share of such fund to each of such beneficiaries; and where, as in this case, the trustees have no discretionary power to select the beneficiaries from the class named, the devise and bequest are void for vagueness and uncertainty.

11. That there is no difference whether a devise or bequest be immediate to an indefinite object, or to a trustee for the use and benefit of an indefinite object. If it be immediate to an indefinite object, it is void; and if it be a trust for an indefinite object, the property that is the subject of the trust is not disposed of, and the trust results to the benefit of those to whom the law gives the property in the absence of any other disposition of it by the testator or donor.

12. If the charity does not fix itself upon any particular object, but is general and indefinite, such as the promotion of the moral and intellectual condition of a race, or the relief of the poor, and no plan or scheme is prescribed, and no discretion is lodged by the testator in certain and ascertainable individuals, it does not admit of judicial administration. In such a case in England the administration of the charity is cast upon the king, to be executed *cy pres*, while in this country the property devised lapses to the next of kin. If, however, in such a case, certain and ascertainable trustees are appointed, with full powers to select the beneficiaries and devise a scheme or plan of application of the funds appropriated to the charitable object, the court will, through the trustees, execute the charity.

13. That where trustees capable of taking the legal estate were originally appointed, so that a valid use was in the first instance raised, and the case was thus brought within the jurisdiction of the court of chancery, that court would

supply any defect which might arise in consequence of the death or disability or refusal of the trustees to act, by appointing new trustees in their place; but when no competent trustees were in the first instance appointed, so that no legal estate ever vested, of course no use was raised, and the court of chancery acquired no jurisdiction of the case.

14. That it is a well settled rule of construction, that all the parts of a will are to be construed together and in relation to each other, and so as, if possible, to form one consistent whole; and that words and limitations may be transposed, supplied, or rejected where warranted by the immediate context or the general scheme of the will, but not merely on conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument; and that we should place such a construction upon the will as will sustain and uphold it in all its parts, if it can be done consistent with the established rules of law and construction.

15. That over the church, as such, the legal tribunals do not have, or profess to have, any jurisdiction whatever, except to protect the civil rights of others and to preserve the public peace. All questions relating to the faith and practice of the church and its members belong to the church judicatures to which they have voluntarily subjected themselves. But the civil courts will interfere with churches and religious associations, and determine upon questions of faith and practice of a church when rights of property and civil rights are involved.

16. The general rule is, that parol evidence of the intention of the testator is inadmissible for the purpose of explaining, contradicting, or adding to the contents of a will; but that its language must be interpreted according to its proper signification, or with as near an approach thereto as the body of the instrument and the state of circumstances existing at the time of its execution will admit of. The doctrine in reference to mistakes in wills is, that courts of equity have jurisdiction to correct them when they are ap-

parent on the face of will. But the mistake must be apparent on the face of the will, and must be such as may be made by a proper construction of its terms; otherwise, there can be no relief. Parol evidence, or evidence *dehors* the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity.

17. In so far as the cases of *M'Cord* v. *Ochiltree*, 8 Blackf. 15; *Sweeney* v. *Sampson*, 5 Ind. 465; and *The Common Council of Richmond*, v. *The State*, 5 Ind. 334, decide that the power and jurisdiction of the courts of this State have been increased and enlarged by the statute of 43 Elizabeth, and that such statute can be executed in this State, they are in conflict with this opinion, and to such extent they are overruled.

The judgment is affirmed, with costs.

L. B. Sims and *D. D. Pratt*, for appellants.

J. A. Stein, *Z. Baird*, *R. H. Milroy*, and *J. H. Gould*, for appellees.

SMITH and ANOTHER *v.* DALLAS and Another.

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CONTRACT.—B. received of A. in November, 1864, a certain number of sheep, on the following terms, set out in a written contract: B. to give annually one pound and a half of wool per head, sheared from said sheep and delivered by the 15th day of June, and pay, on or before the 1st day of July, 1868, four dollars and fifty cents per head for the sheep. If the annual amount of wool was not delivered, the principal sum, as well as the wool, should be due at the end of the year, and the above amount of wool should be paid yearly until the contract was fulfilled. Complaint by A. against B. on the contract, alleging that B. in August, 1865, delivered on the contract a certain quantity of wool, being the amount that was due in June, 1865, and something over, and that no wool was delivered for the years 1866 or 1867, thereby rendering the contract due as to principal and wool. The complaint of A. was filed July 24th, 1867.

B. answered, that the sheep were affected with a contagious disease when he received them, and one half of them died of said disease, without his

fault, before the shearing season in 1865, and the residue before the shearing season in 1866, and that the wool delivered was all that was ever sheared from the sheep.

Held, that by the contract, the property in the sheep passed to B. and they were thenceforth at his risk, and their death did not excuse him from delivering the wool; and on failure to deliver it, A. could maintain his suit for the price of the sheep and for the wool not delivered.

PLEADING.—*Answer.—Warranty.*—An answer setting up a warranty made by parol at the time of entering into a written contract for the sale of the property warranted, and alleging that it was also at the same time agreed by parol that the warranty should not be inserted in the written contract, is bad.

EVIDENCE.—Evidence that at the time of the contract it was agreed that B. might sublet the sheep if he desired, upon the same terms, and when sublet he was to be credited for the same, and that he did thus sublet some of the sheep, is at variance with the written contract and inadmissible.

OPEN AND CLOSE.—Notwithstanding no general denial is filed, if it is necessary for the plaintiff to introduce proof to entitle him to recover full damages, he will be entitled to open and close.

APPEAL from the Vermillion Circuit Court.

DOWNEY, C. J.—Smith and Hays sued Dallas and Dallas on a written contract of November 17th, 1864, by which the defendants acknowledged that they had received of the plaintiffs three hundred and ninety sheep, to keep on the following terms: they agreed to give annually one and a half pounds of wool per head, sheared *from said sheep*, well washed on the sheep, put up in good merchantable order, and delivered by the 15th day of June, to the plaintiffs or their assigns, at Rockville, Park county, Indiana. And on or before the 1st day of July, 1868, they promised to pay to the plaintiffs, or order, four dollars and fifty cents per head for the sheep, or if they paid the plaintiffs the above price between the delivery of the annual amount of wool, and the 1st day of July following, of any year, and expressed the money to them at Iberia, Morrow county, Ohio, then the agreement was to be void. It was further stipulated that if the annual amount of wool was not delivered, the principal sum, as well as the wool, should be due, at the end of the year; and that they would pay the above amount of wool yearly until the contract was fulfilled, &c.

The plaintiffs allege that the defendants delivered to them five hundred and ninety-seven pounds of wool on the contract, August 24th, 1865, which was the amount, and something more than the amount due on the 15th day of June, 1865; that the defendants failed to deliver the five hundred and seventy-three pounds of wool due on the 15th day of June, 1866, and five hundred and eighty-five pounds due June 15th, 1867, thereby rendering the contract both as to principal and wool due, stating values and amounts; wherefore, &c. The defendants answered,

1. They admit the execution of the agreement, but say that at the time they received the sheep they were affected with a contagious disease; one-half of them died soon after they were received, and before shearing time, 15th of June, 1865, and the residue before the shearing season in the year 1866, all from said contagious disease, without any fault of the defendants. They allege the delivery of the five hundred and ninety-seven pounds of wool, which they allege was all the wool they ever sheared from the sheep, and more than one and a half pounds per head; wherefore, &c.

2. That the plaintiffs, at the time of executing the agreement, represented themselves as dealers in sheep and well acquainted with their diseases; that they had imported the sheep from Ohio; that they were sound, healthy, and free from all disease; that the defendants were ignorant of the nature of sheep and their diseases, and relied on the plaintiffs' representations, which the plaintiffs knew; that the sheep were fatally unsound when received, by reason whereof they became entirely worthless, sickened and died, long before the commencement of this suit; wherefore, &c.

3. The same representations, &c., as in the preceding paragraph, and that the defendants held fifty-five other sheep with which they desired the purchased sheep to run, which the plaintiffs knew; that before they knew that said sheep so purchased from the plaintiffs were diseased, their other sheep, from running with them, became diseased, and they too died;

that they expended one thousand dollars in doctoring, feeding, and taking care of them, and have been damaged four thousand dollars, which they set up as a counter claim, and ask judgment for one thousand dollars.

4. That the plaintiffs represented that they were dealers in sheep and acquainted with their diseases, and when they sold said sheep to the defendants, represented them to be sound and free from disease, and warranted them to be sound and healthy; that they were unsound and diseased with a fatal and deadly contagion, of which the defendants were ignorant, which rendered them valueless and caused them to die; that said warranty was untrue, false, and fraudulent, and made with intent to, and did mislead and defraud the defendants, and induced them to enter into the contract sued on; that the defendants refused to take the sheep without a warranty of their soundness; that the plaintiffs then warranted them to be sound, to mislead and defraud the defendants, and induce them to purchase the sheep; that the warranty was false and fraudulent, and the defendants were deceived thereby and induced to enter into the contract; that when the contract was executed there was an understanding and agreement between the parties thereto, that it should not embrace the whole of the terms of the agreement; that the warranty should stand and be binding, but should not be inserted in the writing, but should remain a distinct part of the whole agreement, supplementary to the written agreement, to defraud the defendants; and that they have been damaged thereby to the amount of four thousand dollars; wherefore, &c.

5. Payment.

The plaintiffs demurred to the first and fourth paragraphs of the answer, which demurrer was overruled, and they excepted. There was then a reply by general denial of the whole answer. Trial by jury; verdict for the plaintiffs for two hundred and fifty dollars. Special findings to questions, as follows:

"1. Were the sheep sound at the time of the sale to the defendants?" Ans. "We think they were not."

"2. At the time of such sale, did the agent of the plaintiffs, for the purpose of defrauding the defendants, warrant the sheep sound?" Ans. "We think he did not."

"3. Did the agent of the plaintiffs make a warranty of the soundness of the sheep prior to executing the contract?" Ans. "We think he did."

"4. Were the defendants prevented from delivering the wool specified in the contract, in the years 1866 and 1867, or either of them, from any contagious disease in the sheep at the time of the purchase by the defendants?" Ans. "We think they were."

There was a motion for a new trial for eleven reasons, which was overruled.

Three specifications are made in the assignment of errors. 1. The overruling of the demurrer to the first paragraph of the answer. 2. The overruling of the demurrer to the fourth paragraph of the answer. 3. The refusal to grant a new trial.

1. The first question is as to the overruling of the demurrer to the first paragraph of the answer. The defendants insist that as the suit was commenced on the 24th of July, 1867, before the time when the sheep were to be paid for, which was to be done on the 1st day of July, 1868, if the sheep had died from disease, without their fault, before the time when the payment of wool was to be made in June, 1866, as the wool was to be shorn from the same sheep sold, they were excused from the delivery of the wool by the death of the sheep, which rendered it impossible to perform that part of their contract; and that, therefore, the plaintiffs cannot claim that the principal sum became due by the failure to deliver the wool.

We think this position is wholly untenable. The defendants, by delivering the wool each year as agreed, might have had time to pay for the sheep till July 1st, 1868. But if they failed to deliver the wool, as it became due, they then

became liable to pay for the sheep and for the wool which they had so failed to deliver, and both might be sued for at any time after such failure. The property in the sheep passed by the delivery under the contract to the defendants, and they were thenceforth at their risk. That they died from disease, is no better reason for not complying with the contract than if they had been killed, or had strayed away and been lost. The plaintiffs were not insurers of their continued existence. The parties, by the contract, provided for a failure to deliver the wool, by making the defendants liable for the value of it. This must be construed to cover a failure from whatever cause it may have originated. There is a distinction between a contract to do a thing which is possible in itself, and one whereby the party engages to do something which is absolutely impossible; for in the former case the contract subsists, notwithstanding it is beyond the power of the party to perform it, it being deemed to be his own fault and folly that he did not thereby expressly provide against contingencies and exempt himself from responsibility in certain events. And therefore, in such a case, the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by, or within the control of, the party. Chitty on Con. 803. See, also, *Wood* v. *Long*, 28 Ind. 314.

The demurrer to the first paragraph of the answer should have been sustained. The instruction given by the court based on the same view of the law was not correct, and should not have been given.

2. The next question relates to the fourth paragraph of the answer. We do not see the necessity or propriety of blending fraud and warranty as is done in this paragraph. But regarding it as a defense based on the false and fraudulent representations, we are inclined to hold it to be good. If we were compelled to regard it as setting up a warranty, made by parol at the time of entering into the written contract, we should be compelled to hold it bad. The parties could not, by a parol agreement that a part of their

contract should not be reduced to writing, change the rule of law which excludes parol evidence in such a case, on account of its tendency to vary the written contract.

Several questions are argued and presented for decision arising under the motion for a new trial and the action of the court in overruling it.

3. The court allowed the defendants to introduce evidence on the trial, that it was agreed, at the time of making the contract for the purchase of the sheep, that they might sublet as many as they wanted to of the sheep, to responsible persons, upon the same terms of their contract with the plaintiffs, and when so sublet they were to be credited for that number; and that accordingly they did sublet some of the sheep to other persons, &c. On this subject the court instructed the jury, that if the plaintiffs authorized the defendants to bail out any portion of the sheep, on the same terms on which the defendants took them from plaintiffs, and the defendants did so bail out a portion of said sheep, and the plaintiffs accepted the said bailment contract in part discharge of defendants' contract, then the jury, if they find for the plaintiffs, must allow the defendants a credit on their contract in a sum equal to the amount of the said bailment contract. There was an exception taken to the ruling of the court in admitting this evidence, and giving this direction to the jury.

There was nothing in the pleadings to warrant this evidence, and it was inadmissible, because it was at variance with the written contract. *McClure* v. *Jeffrey*, 8 Ind. 79; *Oiler* v. *Gard*, 23 Ind. 212. In addition to this, the court seems to have regarded the contract on which the suit was brought and that by which the sheep were sublet, as it is called in the charge, as contracts of bailment. We do not so regard the contract in this case, as we have already intimated.

4. Notwithstanding there was no general denial pleaded, it was necessary for the plaintiffs to prove the amount of their claim resulting from the non-delivery of the wool, to entitle them to full damages. They demanded the right to

open and close, which was denied them. This was error, as we have decided in the case of *Fetters* v. *The Muncie National Bank*, 34 Ind. 251.

5. As to the sufficiency of the evidence to sustain the verdict of the jury, we have concluded to express no opinion, in view of the fact that the case will probably be tried again, and will have to be reversed on the grounds above stated.

There are some other points made in the motion for a new trial, but no others for which the case ought, in our opinion, to be reversed.

The judgment is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

A. G. Porter, B. Harrison, and *W. P. Fishback*, for appellants.

B. E. Rhoads, M. G. Rhoads, J. M. Allen, and *W. Mack*, for appellees.

ANDREWS *v.* SPURLIN and Others.

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REAL ESTATE.—*Rule in Shelley's Case.*—The rule in Shelley's case is the law and a rule of property in this State.

ALIENATION OF REAL ESTATE.—*Restriction of*—A grantor of real estate may limit or restrict the power of alienation for a period of time, but an absolute prohibition is void.

SAME.—*Deed.—Construction.*—The language of a deed was as follows, "A. and B. his wife, convey and warrant to C. her lifetime, and after her death to descend to the heirs of her body," certain real estate. "The said C., in consideration of this deed, receipts and forever quitclaims to any further interest in and to her father's real estate whatever, and that a transfer of said real estate by C. shall in no wise be valid."

Held, that the deed conveyed a fee simple absolute to the grantee.

Held, also, that the grantee possessed the right of alienation, and that an alienation by her completely cut off all her heirs.

APPEAL from the Bartholomew Circuit Court.

BUSKIRK, J.—This is an action in ejectment instituted by the appellees against the appellant for the possession of the north-west quarter of the north-west quarter of section 11, township 10, north of range 6 east, situate in Bartholomew county, Indiana. Appellees claim that they are the heirs of Mary Wood, and that as such heirs they are entitled to the land which was conveyed to her by two deeds from Jeffrey Cox and Nancy Cox. That under those deeds she held a life estate only, and she having departed this life, the land in controversy vested in them as her heirs. That Mary Wood could not make a fee simple title for said land, and that the deed of conveyance made by her in fee simple is void. On the contrary, the appellant contends that said deeds vest said estate in fee simple in Mary Wood; that said deeds did not vest said heirs of Mary Wood with an interest in said land as purchasers, but the rule in Shelley's case vested her with title, and that she could make a good and perfect title to the land; that Mary Wood and her husband, for the full value of said land, in good faith, conveyed the same in fee simple on the 24th day of September, 1859, to one Henry Drake, who for full value conveyed in fee simple to one Campbell, on the 18th day of March, 1863, and Campbell, on the 18th day of March, 1863, conveyed to one Lawrence, and Lawrence, on the 13th day of December, 1864, conveyed in fee simple to Mary Markland, who subsequently married one Gates, and she and her said husband on the 20th day of July, 1868, conveyed all said land, in good faith, in fee simple, to appellant, for the sum of sixteen hundred dollars, the full value of said land, and by virtue thereof he claims the ownership of the same.

The question arises first as to the construction of the two deeds from Jeffrey Cox and Nancy Cox to Mary Wood. The only difference in the language of the deeds is, one conveys the west half of the north-west quarter of the north-west quarter of section 11, in township 10, north of range 6 east, and the other conveys the east half of the north-west

quarter of the north-west quarter of said section, township, and range.

The language of the deeds is as follows:

"Jeffrey Cox and Nancy Cox, his wife, of Bartholomew county, in the State of Indiana, convey and warrant to Mary Wood her lifetime, and after her death to descend to the heirs of her body, of Bartholomew county, in the State of Indiana, for the sum of four hundred dollars, the following real estate in Bartholomew county, in the State of Indiana to-wit:"

After describing the tract, then follows:

"The said Mary Wood, in consideration of this deed, receipts and forever quitclaims to any further interest in and to her father's real estate whatever, and that a transfer of said real estate by said Mary Wood shall in no wise be valid."

The deeds upon their face purport to convey to Mary Wood an estate for life, with remainder in fee to the heirs of her body. The appellees claim that this was the legal effect of such conveyances, and that as Mrs. Wood only had an estate for life, she could not convey any greater estate than she possessed, and that upon her death the title of her grantee terminated, and that they as the children and heirs of the said Mary Wood became the absolute owners in fee simple of the said real estate, and were entitled to the immediate possession thereof. If the above position is correct, then the judgment of the court below was right and should be affirmed.

But the appellant insists that said conveyances bring the case within the rule in Shelley's case; that the rule established in that case is recognized as the law and a rule of property in this State; that under that rule Mary Wood became the absolute owner in fee of said lands; and that her conveyance vested her grantee with an estate in fee. If the position assumed by the appellant is correct, then the court below erred in its finding and judgment, and the judgment must be reversed.

The rule in Shelley's case is recognized as the law and a rule of property in this State. *Doe* v. *Jackman*, 5 Ind. 283; *Small* v. *Howland*, 14 Ind. 592; *Hull* v. *Beals*, 23 Ind. 25; *Siccloff* v. *Redman's Adm'r*, 26 Ind. 251.

The rule in Shelley's case is this: "Where a freehold is limited to one for life, and by the same instrument the inheritance is limited, either mediately or immediately, to heirs or heirs of his body, the first taker takes the whole estate, either in fee simple or fee tail; and the words 'heirs' or 'heirs of the body,' are words of limitation, and not of purchase." *Doe* v. *Jackman*, 5 Ind. 283.

This rule is well defined by Preston, who says: "Where a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and afterwards, in the same deed, will, or writing, there is a limitation, by way of remainder, with or without the interposition of any other estate, of an interest of the same quality, as legal or equitable, to his heirs generally, or the heirs of his body, by that name in deeds or writings of conveyance, and by that or some such name in wills, and as a class or denomination of persons, to take in succession from generation to generation, the limitation to the heirs will entitle the person, or ancestor himself, to the estate or interest imparted by that limitation." Preston on Estates, 263.

This court, in *Doe* v. *Jackman, supra*, say: "This rule is, no doubt, a law of property in Indiana. Still it will not, in any case, be allowed to overrule the manifest intent of the testator, provided such intention be not unlawful or inconsistent with the rules of law. The rule is not designed to give meaning to words, but to fix the nature and quantity of an estate. Whenever, then, the matter becomes certain that the term heirs is used with an intent that they should take as purchasers, the instrument should be so construed. Indeed, there is no rule that can guide us safely through the numerous cases and apparent conflict of authorities on this subject, save that which looks to the intent of the testator."

It is a well settled rule of construction that the words

"heirs" or "heirs of the body" are to be construed as words of limitation and not of purchase; and that the words "child" or "children" are to be construed as words of purchase, and not of limitation. See *Sorden* v. *Gatewood*, 1 Ind. 107; *Doe* v. *Jackman*, 5 Ind. 283.

Chancellor KENT states another rule of construction, in a case like this, thus: "There is more latitude of construction in the case of wills, in furtherance of the testator's intention, and the rule seems to have been considered as of more absolute control in its application to deeds."

By this rule the conveyance to Mary Wood for life, and to the heirs of her body, would, at common law, create an estate tail in Mary, but our statute having abolished estates tail, she took a fee simple absolute. The remainder in the heirs of her body the law vested in Mary herself, so that both the estates were vested in the tenant for life. The consequence of the application of this rule of construction to the deeds under consideration is, that Mary Wood, being vested with an estate in fee simple absolute, possessed an unlimited power of alienation, and the heirs of her body could not question the title of him to whom the estate was conveyed.

In *Brown* v. *Lyon*, 2 Seld. 419, the court say, "'Heirs of her body' being words of limitation and not of purchase, have no more power to prevent an alienation than the ordinary words in a conveyance to a man and his heirs have to prevent a conveyance by a tenant of the freehold, who is the grantee named in the conveyance."

There are some exceptions to this rule. Chancellor KENT says, "Where the testator annexes words of explanation to the word *heirs*, as to the heirs of A. *now living*, showing thereby that he meant by the word heirs a mere *descriptio personarum*, or specific designation of certain individals; or where the testator superadds words of explanation, or fresh words of limitation, and a new inheritance is grafted upon the heirs to whom he gives the estate."

Another exception to this rule of construction is, that the

words "his or her children" are construed to be words of purchase, and not of limitation; and where these words are used the rule in Shelley's case does not apply; and if in the case under consideration the conveyance had been to Mary Wood, for life, with remainder to her children, she would have taken an estate for life, and her children a vested remainder. But the conveyance under consideration does not come within any of the above exceptions. There are no words that can be construed to be words of purchase or words of explanation showing an intention to graft a new inheritance upon the heirs of Mary Wood. The language employed brings the case plainly and unmistakably within the rule in Shelley's case. After the death of Mary, the land is to *descend to the heirs of her body*, thus showing that the intention of the grantor was that the heirs of Mary should take by inheritance from their mother, and not a vested remainder by virtue of the deed.

It is contended by the appellees that a subsequent clause in the deed, namely: "The said Mary Wood, in consideration of this deed, receipts and forever quitclaims to any further interest in and to her father's real estate whatever, and that a transfer of said real estate by said Mary Wood shall in no wise be valid," gives the land in question to the heirs of Mary Wood as purchasers; that construing this language with the first part of the deed, takes the case out of the rule in Shelley's case.

This clause was not intended to, and does not, prohibit a transfer of the real estate conveyed to Mary Wood. The language, "and a transfer of said real estate by the said Mary Wood shall in no wise be valid," applies to that interest in her father's real estate which she quitclaimed to the grantor. It is in one and the same sentence with that part in which she quitclaims to any further interest in and to her father's real estate; and the words, said real estate, by all the rules of construction of the English language, apply and refer to the last mentioned real estate described immediately preceding those words in the same sentence. This was a convey-

ance to, and not by, Mary Wood, and this limitation upon the power of alienation could only be binding upon her, if at all, by way of estoppel by reason of her having accepted the conveyance with this condition. But a grantor possesses no power to prohibit the alienation of the real estate conveyed. A grantor may restrict or limit the power of alienation for a period of time, but an absolute prohibition is void. This is well settled by authority and on principle.

We think that it is quite clear that the deeds under consideration vested in Mary Wood an estate in fee simple absolute; that she possessed the undoubted right of alienating the lands, and having exercised that right, she had no estate in the said lands at the time of her death, which could descend to the heirs of her body, and such heirs have no right to question the title of those who claim under and by virtue of her conveyance. The court below erred in overruling the motion for a new trial.

The judgment is reversed, and the cause is remanded, with directions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

F. T. Hord, for appellant.

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Bowen and Others v. Wood.

Pleading.—*Parties.*—In a complaint to foreclose a mortgage, it is sufficient, in order to show that a person made a defendant is a proper party, to allege that he has, or claims to have, a lien on the mortgaged premises.

Same.—*Usury.*—Usurious interest paid at a time when the interest law of 1865 was in force cannot be recovered back or constitute a defense in a suit for the principal.

Same.—*Mortgage.*—A mortgage contained the following description of the property: "The following real estate in Carroll county, in the State of Indiana, to wit: lots 8, 13, and 14, in block 17, and lot 5 in block 18, together with all the privileges and appurtenances unto the same belonging, as also all the stock, implements, machinery and apparatus in and about the paper mill upon said premises situate." In a complaint to foreclose the mortgage, it was alleged that by this description it was understood and intended by the parties that the mortgage should,

and did, embrace certain property, more particularly described in the complaint, by location, section, township, and range, and that the mortgagor never owned any other lots in said county or elsewhere on which was a paper mill. B., who held a subsequent mortgage on the same property, was made a party, and answered that at the time he received his mortgage, he examined the records, and saw a record of the plaintiff's mortgage, and believing that the same did not embrace the property mortgaged to himself, he received his mortgage.

Held, that the answer of B. was bad.

Held, also, that the property was sufficiently described to identify it.

MORTGAGE.—*Fixtures.*—Machinery put in a mill after the execution of a mortgage, to supply the place of old and worn out articles, becomes a part of the realty, and is subject to the lien of the mortgage.

ATTORNEY.—An attorney cannot appear for a party who has not retained him.

APPEAL from the Carroll Common Pleas.

DOWNEY, C. J.—Suit by the appellee to foreclose a mortgage executed to him by Dewey and wife and Griffith and wife. Bowen was made a defendant as a subsequent incumbrancer. The plaintiff's mortgage was executed on the 3d day of October, 1865, and was recorded on the 28th day of that month. It describes the mortgaged premises as follows:

"The following real estate, in Carroll county, in the State of Indiana, to wit: Lots 8, 13, and 14, in block 17, and lot 5 in block 18, together with all the privileges and appurtenances unto the same belonging, as also all the stock, implements, machinery, and apparatus in and about the paper mill upon said premises situate."

It is alleged in the complaint, that by this description it was understood and intended by the parties to the mortgage that the same should, and did, embrace lots 8, 13, and 14, in block 17, and lot 5 in block 18, of lands on the west side of the Wabash and Erie Canal, in the south-east quarter of section 30, in township 25, north of range 2 west, in said county and State, and which had theretofore been conveyed by the trustees of the Wabash and Erie Canal to Messrs. Spears and Case; and also all the stock, implements, machinery, and apparatus in and about the paper mill upon said premises, which had been known as the "Robertson and Wood paper mill," and was then known as the "Dewey and Griffith paper mill;" that the said Dewey and Griffith were not, at the

date of said mortgage, or at any other time, the owners or in possession of any other property in said county or elsewhere, upon which there was a paper mill; that said note and mortgage were given for a balance of unpaid purchase-money of the premises mortgaged; that Bowen had, or claimed to have, a lien upon said premises; and that he had notice of the facts alleged, and of the understanding and intention of the parties to the mortgage; and that his lien, if any, was junior to that of the appellee.

Copies of the note and mortgage are filed with the complaint. The complaint consisted of three paragraphs, to the third of which a demurrer was sustained; and to the first and second demurrers were filed and overruled.

The first error assigned relates to the sufficiency of the first and second paragraphs of the complaint. The only objection to these paragraphs urged by counsel for the appellants is, that they do not show sufficient reason for making Bowen a defendant to the action. We think there is sufficient reason shown for making him a party. See *Martin* v. *Noble*, 29 Ind. 216.

After the demurrers were overruled, Griffith was defaulted. Dewey answered, first, a general denial; second, payment; third, usury, in this form:

"That as to the sum of five hundred dollars, part and parcel of said note, they paid unto the plaintiff said sum as interest upon said note, over and above the legal rate of interest."

Fourth, that as to certain machinery, apparatus, and fixtures in and about said paper mill, viz.: two turbine water wheels, four pieces of shafting, two trunnions, one boiler, one marking cylinder, one forming vat, one brick lime house, one frame bleach house, one frame boiler house, one pump in engine room, two bed plates, two pumps in machine room, and two hundred feet of piping, the same were not owned by the mortgagors at the time of the execution of the mortgage, and were not then on the premises, but have been placed there since by the mortgagors.

The fifth paragraph was withdrawn.

Bowen answered, first, general denial; second, payment by the mortgagors; third, that as to the sum of five hundred dollars, part of said note, the same was paid to plaintiff by Dewey and Griffith as interest, over and above the legal rate of interest; that he had a mortgage on the premises which was due and unpaid; that his co-defendants were insolvent; and that the property mortgaged was insufficient to satisfy both his and the plaintiff's demand; fourth, that on the 10th day of May, 1869, all his co-defendants executed to him a mortgage upon the premises mortgaged to the plaintiff, for the sum of five thousand dollars, which was recorded May 20th, 1869; that at the time he received his mortgage, he examined the records to ascertain whether there were other mortgages or liens upon the premises, at which time he saw a record of the plaintiff's mortgage, and believing that the same did not embrace the property mortgaged to him, he received his mortgage, which was due and unpaid.

The fifth paragraph of Bowen's answer was the same as the fourth paragraph of the answer of Dewey.

Demurrers were sustained to the third paragraph of the answer of Dewey, and to the third and fourth paragraphs of the answer of Bowen.

Bowen, by leave of the court, filed his amended third paragraph of answer, which states that since the execution of the note sued on, at various times, his co-defendants have paid the plaintiff the aggregate sum of one thousand and eighty-four dollars as interest thereon, and asks that the excess above the legal rate of interest be deducted from the plaintiff's demand; that he held a mortgage on the premises described, which was unpaid.

The plaintiff replied, first, by general denial; and for a further reply to the fourth paragraph of the answer of Dewey, and to the fifth paragraph of the answer of Bowen, the plaintiff alleged, second, that the two turbine water wheels, four pieces of shafting, two trunnions, one boiler, one marking cylinder, one forming vat, one brick lime house, one frame bleach house, one pump in the engine room, two bed plates,

two pumps in the machine room, and two hundred feet of piping, were placed in said paper mill since the execution of the plaintiff's mortagage for the express purpose of supplying the places of old and worn out articles of the same character belonging and attached to said paper mill when the plaintiff's mortgage was executed. A demurrer to the second paragraph of the reply was overruled.

There was a trial by the court, and finding as follows:

That the allegations in the complaint were true, and that to secure the note sued on, Dewey and Griffith had executed the mortgage mentioned in the complaint, whereby they mortgaged to the plaintiff the property described in the complaint, to wit, Lots number 8, 13, and 14, in block 17, and lot number 5 in block 18, of the subdivision of lands on the west side of the Wabash and Erie canal, in the south-east quarter of section 30, township 25, north of range 2 west, in Carroll county, Indiana, &c., upon which premises are situated a paper mill, &c., together with the machinery, implements, &c., which premises were described in said mortgage by the description of "lots 8, 13 and 14, in block 17, and lot 5 in block 18, together with all the appurtenances and privileges unto the same belonging, as also all the stock, implements, machinery, and apparatus in and about the paper mill, upon said premises situated;" that on the 10th day of May, 1869, the said Dewey and Griffith executed and delivered to Bowen the mortgage mentioned in his answer, upon which there was due five thousand six hundred and seventy-three dollars; that at the time of the execution of said mortgage to Bowen, he had constructive notice of said mortgage to the plaintiff, and also actual notice of the same, and of the lien of the plaintiff upon said premises, and of the further fact that by the description in said mortgage to the plaintiff was meant and intended by Dewey and Griffith and the plaintiff the property described in the plaintiff's complaint; that the property embraced in the mortgage to the plaintiff constitutes one entire property, used for the purpose of manufacturing paper, and was not susceptible of division without

great injury thereto; and the court further found that the two turbine water wheels, four pieces of shafting, two trunnions, one boiler, one marking cylinder, one forming vat, one brick lime house, one frame bleach house, one frame boiler house, one pump in the engine room, two bed plates, two pumps in the machine room, and two hundred feet of piping, mentioned in the several answers of the defendants, were placed in said paper mill since the execution of the plaintiff's mortgage, for the purpose of supplying old and worn-out articles of the same character, belonging to said paper mill when the plaintiff's mortgage was executed, and that they formed a part of the paper mill and were subject to the plaintiff's lien.

A motion for a new trial was overruled, and judgment rendered on the finding.

2. The second alleged error relates to the sustaining of the demurrer to the third paragraph of the answer of Dewey setting up the payment of five hundred dollars over and above the legal rate of interest. If this paragraph sets out the facts with sufficient particularity (see *Engler* v. *Collins*, 16 Ind. 189) in other respects, it fails to show when the amount was paid. If it was paid while the act of 1865 (3 Ind. Stat. 316) was in force, it could not be recovered back, or set off, and therefore the paragraph is bad.

3. The third point made is, that the court erred in sustaining the demurrer to the fourth paragraph of the answer of Bowen. We are quite well satisfied that this ruling was correct. The fact that Bowen examined the record of the mortgage of the plaintiff, and *believed* that it did not embrace the property mortgaged to him, and therefore took his mortgage, is no defense. The plaintiff's rights cannot be made to depend on what he believed. There was no merit in this ground of defense, as fully appears from the finding of the court that Bowen had constructive and actual notice of the mortgage and lien of the plaintiff, and that it was meant by the parties to embrace the property described in the complaint, and on which the defendant Bowen was taking his mortgage.

Perhaps this point was involved in the issue made by the general denial. It would seem that it was so considered by the common pleas, as it found on that point. We think the property was sufficiently described to identify the same. It was described in the mortgage as lots in Carroll county, Indiana, giving the numbers, on which there was situated a paper mill; and the complaint alleges that the mortgagors never, at any time, owned any other lots in that county or elsewhere, on which was a paper mill. The more particular description given in the complaint which is incorporated into the judgment, and which will enable the sheriff to advertise and sell the property, renders the description entirely sufficient. *Whittelsey* v. *Beall*, 5 Blackf. 143. Bowen says he examined the record of the plaintiff's mortgage. He then saw that it was a mortgage from Dewey and Griffith on real estate on which was a paper mill, including the personal property in the same. Having learned this fact, he takes a mortgage on the same property, by a description only a little variant from that in the plaintiff's mortgage, naming the paper mill, and enumerating the articles of personal property therein, almost as in the plaintiff's mortgage. The paragraph was bad.

4. The next question is as to the sufficiency of the second paragraph of the reply. It alleges that the articles enumerated, which were put in the paper mill since the date of the plaintiff's mortgage, were put there to supply the place of old and worn out articles of the same character, belonging and attached to the mill when the plaintiff's mortgage was made. We must regard these things as having become a part of the realty by their annexation thereto, and as being subject, with the rest of the property, to the prior lien of the plaintiff's mortgage. *Sparks* v. *The State Bank*, 7 Blackf. 469, and cases cited; *Seymour* v. *Watson*, 5 Blackf. 555; *Millikin* v. *Armstrong*, 17 Ind. 456; 1 Hilliard on Mortgages, 432, *h.*

5. On affidavit, the attorney who was appearing for the defendants was required to show his authority for so doing as to Griffith, and showing only that he had been employed by Dewey, and not by Griffith, he was not allowed to defend

for Griffith. There was no error in this ruling. He could not appear for a party who had not retained him and who did not wish to make any defense to the action. There is no other question in the record.

The judgment is affirmed, with two per cent. damages and costs.*

J. Applegate, *S. A. Huff*, and *B. W. Langdon*, for appellants.

J. H. Gould and *R. P. Davidson*, for appellee.

* Petition for a rehearing overruled.

STANLEY *v.* MANLY.

ELECTION.—*Distinguishing Mark on Ballot.*—The words "Republican ticket," printed at the head of a ballot, and on the same side that the names of candidates are printed upon, is not such a distinguishing mark or embellishment as to require the inspector of an election to refuse the ballot when offered.

APPEAL from the Cass Circuit Court.

PETTIT, J.—This was a contested election for the office of Sheriff of Cass county, commenced before the board of commissioners, where the contestee, appellee here, was successful; and on appeal to the circuit court, on his motion, the cause was dismissed for want of a sufficient complaint or statement of facts. In 1867, the General Assembly enacted as follows: "That all ballots which may be cast at any election hereafter held in this State shall be written or printed on plain white paper, without any distinguishing marks or other embellishment thereon except the name of the candidates and the office for which they are voted for, and inspectors of elections shall refuse all ballots offered of any other description: *Provided*, Nothing herein shall disqualify the voter from writing his own name on the back thereof."

At the October election, in 1870, there were ballots voted

for the contestee, with the words "Republican Ticket" printed at the head, and on the same side that the names of the candidates were printed. The only question before us is, was this such a distinguishing mark or embellishment as to require the inspectors to refuse the ballots when offered? In *Druliner* v. *The State*, 29 Ind. 308, this question was directly before this court, and was answered in the negative; and we fully concur in the decision of the court. See, also, *Gass* v. *The State, ex rel. Clarke*, 34 Ind. 425.

The judgment is affirmed, at the costs of the appellant.

D. Turpie and *D. P. Baldwin*, for appellant.

D. B. McConnell, H. C. Thornton, S. T. McConnell, and *M. Winfield*, for appellee.

NAPIER and Another *v.* MAYHEW and Another.

PLEADING.—*Complaint.—Evidence.*—In a complaint by M. and B. upon a note, they alleged that they were doing business under the firm name and style of M. & B., and that the defendants were doing business under the name and style of N. & V., and that the defendants by their note, a copy of which was filed with the complaint, promised to pay the plaintiffs, &c.

Held, that the note being set out, the allegations of the complaint were equivalent to a direct charge that the defendants, by the names of N. & V., by their note, promised to pay the plaintiffs by the names of M. & B. the sum mentioned in the note.

Held, also, that the allegations in the complaint as to the partnership or firm name and style of the respective parties, was mere surplusage, and not necessary to be proved, and might be regarded as stricken out; and the execution of the note not being denied under oath, no proof was necessary other than the note itself.

APPEAL from the Fountain Circuit Court.

WORDEN, J.—Complaint by the appellees against the appellants, as follows, after entitling the case:

"Plaintiffs, doing business under the firm name and style of Mayhew & Branham, complain of the defendants, doing business under the name and style of Napier & Voltz, and say that the defendants, on the 16th day of February, 1870,

by their note, a copy of which is filed herewith and made a part of this complaint, promised to pay the plaintiffs seven hundred and sixty-seven dollars and forty-six cents; that on February 16th, 1870, defendants paid forty-seven dollars and ninety cents on said note, and that the residue thereof and interest are yet due and unpaid; therefore the plaintiffs demand judgment for eight hundred dollars, and other proper relief."

COPY OF NOTE.

"767.46 COVINGTON, IND., Feb. 16, 1870.

One day after date, we promise to pay to the order of Mayhew & Branham, seven hundred and sixty-seven and $\frac{46}{100}$ dollars, with interest at ten per cent. from date; value received, without any relief from valuation or appraisement laws.

(Signed,) NAPIER & VOLTZ."

Answer of general denial; trial by the court; finding and judgment for the plaintiffs, a new trial being moved for by the defendants and denied.

On the trial, the note described was the only evidence offered.

The appellants assign errors: first, that the complaint does not state facts sufficient, &c.; and second, that the court erred in overruling the motion for a new trial.

There was no demurrer to the complaint, nor motion in arrest of judgment.

The complaint, however, was amply good on demurrer. It charges that the defendants, by their note, a copy of which was set out, promised to pay to the plaintiffs, &c. The note being set out, the allegation is equivalent to a direct allegation that the defendants, by the names of Napier & Voltz, by their note, &c., promised to pay to the plaintiffs, by the names of Mayhew & Branham, the sum mentioned in the note. *Hunt* v. *Raymond*, 11 Ind. 215; *Farley* v. *Harvey*, 14 Ind. 377.

This disposes of the objections made to the complaint.

It is claimed that there should have been evidence showing the partnership of the respective parties to the note, or otherwise identifying them respectively as the makers and

payees of the note. All that is said in the complaint as to the partnership or firm name and style of the respective parties was mere surplusage, not necessary to be proven, and may be regarded as stricken out. After striking all that out, there remains the allegation, in substance, that the defendants, by the names subscribed to the note, made the note to the plaintiffs by the names specified therein.

The defendants not having denied under oath the execution of the note by them, nor the names of the payees as set out in the complaint, no proof upon either point was necessary other than the note itself, which was sufficient to authorize the recovery. *Abernathy* v. *Reeves*, 7 Ind. 306; *Rees* v, *Simons*, 10 Ind. 82; *Hunt* v. *Raymond*, *supra*; *Hauser* v. *Smith*, 13 Ind. 532; *Farley* v. *Harvey*, *supra*; 2 G. & H. 105, sec. 80.

The judgment below is affirmed, with costs, and ten per cent damages.

T. F. Davidson, for appellants.

T. A. Hendricks, *O. B. Hord*, and *A. W. Hendricks*, for appellees.

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BARTHOLOMEW *v.* LANGSDALE.

PRACTICE.—*Motion for New Trial.*—A motion for a new trial, assigning as reasons therefor, that "the instructions given by the court to the jury are erroneous, in this, that the same are contrary to, and are not, the law," and that, "the court erred in instructions given to the jury," is sufficiently specific to raise the question of the correctness of any instruction given, the party making the motion having, at the proper time, excepted to all the instructions given.

ATTORNEY.—*Action for Services.—General Employment.*—Suit to recover for services rendered as an attorney. Upon the trial, the court gave the following instruction: "Where there is a general employment for an agreed sum, of an attorney, that employment extends until the final termination of the case in the court of last resort, and no additional sum can be charged for services rendered, unless there is an express agreement to pay for the same."

Held, that this instruction was erroneous.

APPEAL from the Marion Common Pleas.

BUSKIRK, J.—The appellant sued the appellee for one thousand dollars, for professional work, labor, and services, as follows: making six motions for new trials, making and filing bills of exceptions in Myer *v.* Hereth, ordering transcripts and getting cases ready for Supreme Court, obtaining supersedeas in same, making thirteen abstracts for Supreme Court, making three assignments of errors; all which labor and services were rendered in the following cases, namely: Mary F. Love *v.* John C. Hereth *et al.*, Mary Smith *v.* Hereth *et al.*, George B. Yandes *v.* Hereth *et al.*, F. A. W. Davis *v.* Hereth *et al.*, Merchants' National Bank *v.* Hereth *et al.*, and George F. Meyer *v.* Hereth *et al.*

The defendant in this action was a defendant in the above cases, recently decided by this court.

The defendant answered, first, general denial; second, payment; third, that plaintiff agreed to render the services for one hundred dollars, which had been paid; fourth, that the services were rendered upon a joint employment by Hereth and defendant, and that Hereth had paid plaintiff. The plaintiff replied by general denial.

The case was tried by a jury, resulting in a verdict for defendant. A motion for a new trial was made, overruled, and an exception was taken.

The principal error relied upon for the reversal of the case is the alleged erroneous instruction of the court, The court, at the request of the defendant, gave the following instruction to the jury:

7. "Where there is a general employment, for an agreed sum, of an attorney, that employment extends until the final termination of the case in the court of last resort, and no additional sum can be charged for services rendered, unless there is an express agreement to pay for the same."

It is earnestly maintained by the appellee that the motion for a new trial is not specific enough in its reference to the instructions complained of to raise the question as to the

correctness of the instruction. We admit that under the decisions in *Robinson* v. *Hadley*, 14 Ind. 417; *Elliott* v. *Woodward*, 18 Ind. 183; *Snodgrass* v. *Hunt*, 15 Ind. 274, and *Horne* v. *Williams*, 23 Ind. 37, the objection would be well taken; but this court in *Horton* v. *Wilson*, 25 Ind. 316, and *Dawson* v. *Coffman*, 28 Ind. 220, in express terms, overrule the case of *Horne v. Williams, supra*, and in principle overrule them all. In *Dawson* v. *Coffman, supra*, the plaintiff excepted to the instructions, and in the motion for a new trial assigns as a reason, among others, "that error of law occurred at the trial of the cause, which was excepted to at the time by the plaintiff, in this, that the court, in giving instructions to the jury, gave instructions contrary to law."

The court say: "A liberal administration under the code requires that we should look to the substantial right of a case, disregarding mere technical forms. But the ends of justice require that in the administration of the law order should be regarded, so that each party litigant may be fully heard and each cause fully considered in all its parts, that no undue advantage may be allowed to either party.

"We cannot see that any injustice could possibly arise when the instructions were excepted to at the time they were given, and then the court, on the motion for a new trial was notified that the party making the motion relied upon the errors of law occuring at the trial, and excepted to, in the giving of the instructions to the jury. Such a motion, we think, brings in review the entire instructions excepted to."

In the case under consideration the plaintiff excepted to the instructions given to the jury, and in his motion he makes the following references to the instructions, namely:

5. "That the court erred in instructions given to the jury."

8. "That the instructions given by the court to the jury, are erroneous, in this, that the same are contrary to and not the law."

We think that the court was fully informed that the plain-

tiff relied upon the error of law occurring at the trial, in the giving of instructions. The plaintiff had excepted to all the instructions given by the court of its own motion and at the request of the defendant, and claimed that they were all erroneous. Would it have been any more certain to have referred to them by number? If a party only excepts to a part of the instructions, then, in his motion for a new trial he should refer to such instructions by number, or in some manner inform the court what particular instructions he complains of. We think that the motion for a new trial is sufficiently certain to raise the question as to the correctness of the instruction. We believe that it is our duty to decide every cause upon its substantial merits, and that we should only be governed by technical rules and forms when it is necessary to subserve the ends of justice, or to prevent injustice.

The proposition of law enunciated in the above instruction is stated in a very broad and unqualified manner. It is probably true as a general proposition that the general employment of an attorney, for an agreed sum, extends to the termination of a cause, but it is not universally true. Suppose that an attorney only practices in the common pleas court, or the circuit court, or the Supreme Court, or in one particular county, or does not practice in the federal court, and this is known to a person who employs him, will it be maintained that he would have to follow the case to the Supreme Court? or if a change of venue was taken from the county, or the cause was certified, under the laws of Congress, from the state to the federal court, that the attorney would, under his general employment, be required to attend to the case in the county to which the cause was sent or in the federal court? However this may be, we think, it is quite certain that the latter part of the instruction was clearly erroneous and well calculated to mislead the jury. The court told the jury, that "no additional sum could be charged for services rendered under a general employment for an agreed

sum, unless there was an express agreement to pay for the same."

This instruction ignores the fact that there is such a thing as an implied obligation. A man may by implication create as strong a liability as he can by an express promise. Take the case under consideration as an illustration. There were seven cases pending against Hereth and Langsdale. It was expected that the cases would be appealed to the Supreme Court. Hereth and the plaintiff both swear that Hereth employed the plaintiff in those cases for the sole and express purpose of taking down the evidence so that it could be embodied in bills of exceptions, and agreed to and did pay him one hundred dollars for such services. The plaintiff further testifies that the defendant came to his office, after the cases had been tried in the court below, and wanted him to prepare the cases for the Supreme Court; that he informed the defendant of the nature and extent of his employment in the cases by Hereth, that his employment had terminated, and that he could render no further services in the cases unless he was paid therefor; and thereupon, the defendant had told him to go ahead and do the work. But suppose he made no promise and never agreed to pay him for such services, would it be seriously insisted, under such a state of facts, that defendant would not be liable for such services? And yet there would be no express agreement to pay, but there would be a very strong implied obligation. We do not wish to be understood as saying that the above are the facts in this case; for the plaintiff says that there was an express promise on the part of the defendant to pay him, while the defendant contradicts the plaintiff in nearly every essential particular.

But suppose that both the plaintiff and the defendant had sworn that the facts were as above stated, would not the jury have understood from the above instruction that the defendant would not have been liable? that there being no express agreement to pay, he was not liable for services rendered under the facts and circumstances above stated?

The instruction was well calculated to mislead the jury; and from the evidence in the record, we are forced to the conclusion that it injuriously affected the rights of the plaintiff. We think there should be a new trial in this cause.

The judgment is reversed, with costs, and the cause is remanded, with directions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

J. Hanna and *F. Knefler*, for appellant.

B. K. Elliott and *C. L. Holstein*, for appellee.

THE STATE *v.* ECHERT.

APPEAL from the Wayne Criminal Circuit Court.

DOWNEY, C. J,—The appellee was indicted for a nuisance, was tried, and acquitted, in the criminal court.

The case is brought to this court, we suppose, by the prosecuting attorney, under sec. 119, 2 G. & H. 420.

No errors are assigned, and we cannot therefore regard the case as properly here for any purpose.

The appeal is dismissed.

B. W. Hanna, Attorney General, for the State.

W. H. Coombs and *W. H. H. Miller*, for appellee.

BLIZZARD v. PHEBUS.

PRACTICE.—*Affidavits.—Bill of Exceptions.*—Affidavits filed during the progress of a cause can only be made a part of the record by a bill of exceptions.

APPEAL from the White Circuit Court.

BUSKIRK, J.—The record in this case presents no question for the decision of this court. The cause originated before a justice of the peace, and was appealed to the circuit court, where it was tried by a jury, resulting in a verdict for the defendant.

The plaintiff below, and appellant here, moved the court for a new trial, assigning as a cause that one of the jurors had formed and expressed an opinion as to the merits of the cause, prior to his being called as a juror, which fact was unknown when he was accepted on the said jury. A motion of this kind must be supported by affidavit. The clerk has copied into the record affidavits in support of the motion, and also affidavits on the part of the defendant, to the effect that the juror in question was sworn as to his competency as a juror, and stated that he had both formed and expressed an opinion, and that the plaintiff accepted him as a juror, with full knowledge that he had formed and expressed an opinion as to the merits of the cause; but the affidavits are not made a part of the record by a bill of exceptions. It has been so long and repeatedly decided by this court that affidavits filed during the progress of a cause can only be made a part of the record by a bill of exceptions, that it is hardly worth while to refer to such decisions, but we will refer to a few of the later decisions. *Round* v. *The State*, 14 Ind. 493; *Leyner* v. *The State*, 8 Ind. 490; *Taylor* v. *Fletcher*, 15 Ind. 80; *Cochran* v. *Dodd*, 16 Ind. 476; *Murphy* v. *Tilly*, 11 Ind. 511; *Wilson* v. *Truelock*, 19 Ind. 389; *Merritt* v. *Cobb*, 17 Ind. 314; *Hasselback* v. *Sinton*, 17 Ind. 545; *Horton* v. *Wilson*, 25 Ind. 316; *Whiteside* v. *Adams*, 26 Ind. 250; *Bell*

v. *Rinker*, 29 Ind. 267; *Fisher* v. *Ewing*, 30 Ind. 130; *Potter* v. *Stiles*, 32 Ind. 318.

The judgment is affirmed, with costs.

W. H. Blizzard, for appellant.

E. Hughes, for appellee.

COLTER *v.* LOWER and Others.

85 285
159 288

FALSE IMPRISONMENT.—*Pleading.*—An action for false imprisonment can be maintained without alleging in the complaint that the imprisonment was malicious and without probable cause.

SAME.—*Distinguished from Malicious Prosecution.*—If an imprisonment is under legal process, but the action has been commenced and carried on maliciously and without probable cause, it is malicious prosecution. If it has been extra-judicial, without legal process, it is false imprisonment.

APPEAL from the Warren Circuit Court.

DOWNEY, C. J.—Colter sued the appellees, alleging in his complaint that the defendants, on the 16th day of November, 1867, falsely, wrongfully, and unlawfully seized and arrested the plaintiff in the said county of Warren, and took and confined him in unlawful imprisonment at the town of West Lebanon, in said county, for the space of twelve hours, and continued said arrest and false imprisonment by taking said plaintiff into the county of Tippecanoe, in the State of Indiana, and there unlawfully and falsely imprisoned him in the county jail of that county for twelve days, when he was discharged, no cause for said arrest and imprisonment nor charge of any kind having been at any time preferred against him in any court; that by reason of said false imprisonment he was not only deprived of his liberty, but was compelled to and did undergo great mental suffering, anguish, and humiliation and bodily pain and suffering, and was prevented from attending to his daily affairs for a long space of time, to wit, one month, and was compelled to expend —— dollars

for costs and counsel fees in and about his said false imprisonment, by means of which he has been damaged five thousand dollars; wherefore, &c.

There was a demurrer to this complaint, for the reason that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled, and the complaint held to be sufficient.

Robert Anderson, one of the defendants, filed his separate answer, consisting of seven paragraphs. The plaintiff demurred to the second, third, fourth, fifth, sixth and seventh paragraphs thereof, and the court, another judge presiding, on this demurrer adjudged the complaint insufficient. The other defendants then again demurred to the complaint, and their demurrer was sustained; the plaintiff excepted, and final judgment was rendered in favor of the defendants.

The only question for our decision is as to the sufficiency of the complaint, for the court did not pass on the sufficiency of the answer, and therefore that question is not before us as a court of error.

It is insisted by the appellees that the complaint is bad for the reason that it does not allege that the imprisonment was malicious and without probable cause. It must be conceded that if the approved precedents in the best works on pleading are to be received as evidence of what the law is on this subject, the allegation in question is essential. 2 Chit. on Plead. 857, *et seq.* That the allegation is essential in an action for malicious prosecution, is well understood, and is recognized as the rule by this court; *Wilkinson* v. *Arnold*, 11 Ind. 45; *Ammerman* v. *Crosby*, 26 Ind. 451; *Stancliff* v. *Palmeter*, 18 Ind. 321. But we do not think it essential in an action for false imprisonment, such as the one in question.

There is a marked distinction between malicious prosecution and false imprisonment. At common law, the former was the subject of an action of *trespass on the case*, while, for the latter, *trespass vi et armis* was the remedy. 1 Chit. Plead. 133, 167. If the imprisonment is under legal process, but the action has been commenced and carried on maliciously

and without probable cause, it is malicious prosecution. If it has been extra-judicial, without legal process, it is false imprisonment. In *Turpin* v. *Remy*, 3 Blackf. 210, it was said by STEVENS, J., in delivering the opinion of the court, "An action for a malicious prosecution can only be supported for the malicious prosecution of some legal proceeding, before some judicial officer or tribunal. If the proceedings complained of are extra-judicial, the remedy is trespass, and not an action on the case for a malicious prosecution." In *Johnstone* v. *Sutton*, 1 T. R. 544, it is said in speaking of the action for malicious prosecution, "There is no similitude or analogy between an action of trespass, or false imprisonment, and this kind of action. An action of trespass is for the defendant's having done that, which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution, which, upon the stating of it, is manifestly legal."

The cases for false imprisonment in this court, we think, fully maintain this distinction, and show that malice does not enter into consideration in actions for that cause. The case of *Taylor* v. *Moffatt*, 2 Blackf. 305, was for false imprisonment, and the defendant was held liable because the judge, who awarded an attachment, at his instance, for violation of an injunction, was held to have no jurisdiction to do so, and the defendant was subjected to the payment of three thousand dollars damages. There was no indication of malice. In *Hall* v. *Rogers*, 2 Blackf. 429, the defendant was held liable, because the charge on which the arrest and imprisonment took place was not legally sufficient. See also *Wasson* v. *Canfield*, 6 Blackf. 406; *Poulk* v. *Slocum*, 3 Blackf. 421.

No proof of malice or want of probable cause is necessary to make out a case for false imprisonment. 2 Starkie's Ev. 1112.

It frequently happens that false imprisonment includes a battery, but it is obvious that the latter is not necessarily included in the former. 2 Starkie's Ev. 1113.

An action for malicious prosecution may be maintained, although there has been no imprisonment.

That the plaintiff was assaulted and beaten, or that the arrest and imprisonment were otherwise accompanied with malice or other indignities, may, no doubt, be given in evidence, as tending to affect the amount of damages. 2 Starkie's Ev. 1114.

We regard the complaint as setting out a good cause of action. If there was any legal justification for the acts alleged to have been committed by the defendants, it devolves on them to set it up in their defense.

The judgment is reversed, with costs, and the cause remanded.

J. McCabe and *J. M. Butler*, for appellant.

W. P. Rhodes and *W. Z. Stuart*, for appellees.

KERR *v.* THE STATE, on the Relation of WRAY.

POOR PERSON—Where one has been permitted to prosecute or defend as a poor person, the court must assign him an attorney and all other officers requisite for the prosecution or defense.

SAME.—*Clerk.*—If the clerk is not assigned as one of the officers requisite, he will not be bound to furnish a transcript of the proceedings gratuitously.

SAME.—*Ability to Labor.*—Where a party is permitted to prosecute or defend as a poor person, the action of the court cannot be questioned by showing that the person is of sufficient physical ability to labor for and acquire the necessary means to defend or prosecute; if he has not the means, it is immaterial whether the want of means has arisen from one cause or another.

PLEADING.—*Fraud.*—To make a good charge of fraud, it must be shown in what the fraud consisted.

APPEAL from the Fountain Circuit Court.

DOWNEY, C. J.—Two errors are assigned in this case: first, the insufficiency of the complaint; second, the sustaining of the demurrer of the relator to the answer of the appellant.

The complaint alleges that Wray had sued one Sangster, in the circuit court; that there was a trial by jury, verdict

for the defendant, motion for a new trial overruled, and judgment rendered; that a bill of exceptions was filed and an appeal prayed and allowed to this court; that the plaintiff, Wray, then filed his petition to be allowed to prosecute said action as a poor person; that the court granted the prayer of said petition, and ordered that the plaintiff be permitted to prosecute said action as a poor person, appointed Richard M. Nebeker as his counsel, who demanded of the appellant, who was then the clerk of said court, to make out and certify a transcript in said case, which he refused to do.

The defendant was required to show cause why a mandate should not issue against him, requiring him to make out, certify, and deliver the transcript to the relator.

The defendant showed cause by filing an answer, or return, alleging, that the relator was not a poor person in contemplation of law; that the order of the court permitting him to prosecute as a poor person was wrongfully and fraudulently obtained; that the court was imposed upon by the said relator and his attorney; that Wray is a stout, able-bodied man and abundantly able to labor for the means necessary to pay for the transcript; that he is in no way incapacitated from performing manual labor, and has no one dependent upon him for support; that if he is in indigent circumstances, it is wholly attributable to his indolence and laziness; that if he would use ordinary industry, he would have abundant means to pay the fees for said transcript, as well as the costs in the case; that it will require several days of hard labor to prepare said transcript; and that the fees therefor will be worth thirty or forty dollars; and respondent insists that it will be burdensome and outrageous to compel him to expend so much labor gratuitously for a person who is able to pay a compensation therefor.

There was a demurrer to this answer, or return, which was sustained by the court, and an exception taken by the defendant.

The defendant failing to make any further defense, judg-

ment was rendered that he make out and deliver the transcript within thirty days.

From this judgment the defendant appeals to this court.

The statute allowing persons to prosecute or defend *in forma pauperis* is as follows: "Any poor person, not having sufficient means to prosecute or defend an action, may apply to the court in which the action is intended to be brought, or is pending, for leave to prosecute or defend, as a poor person. The court, if satisfied that such person has not sufficient means to prosecute or defend the action, shall admit the applicant to prosecute or defend as a poor person, and shall assign him an attorney to defend or prosecute the cause, and all other officers requisite for the prosecution or defense, who shall do their duty therein without taking any fee or reward therefor from such poor person." 2 G. & H. 44, sec. 15.

It will be seen that the court must, when the applicant has been admitted to prosecute as a poor person, assign him an attorney, "and all other officers requisite for the prosecution or defense." It does not appear that the clerk was assigned in this case as one of the "other officers requisite," &c., and therefore it is not shown that he was bound to make out and furnish the required transcript gratuitously. For this reason the complaint was bad.

We think the court committed no error in sustaining the demurrer to the answer, or return. The fact that the relator was of sufficient physical ability to labor for and acquire the means necessary to procure the transcript, is not a sufficient answer to the rule. If the party has not the means, it seems to be immaterial under the statute whether the want of means arose from one cause or another. The court, "if satisfied," &c., "shall admit the applicant," &c.

It is also questionable whether an officer who has been ordered to perform services gratuitously for a poor person can in this way controvert the correctness of the order. The allegation of fraud here is clearly insufficient. It does not show in what the fraud consisted, which is essential to make

a good charge of fraud. *Keller* v. *Johnson*, 11 Ind. 337; *Webster* v. *Parker*, 7 Ind. 185.

The judgment is reversed, with costs, and the cause remanded.

W. A. Tipton, for appellant.

R. M. Nebeker, for appellee.

THE PITTSBURGH, CINCINNATI, AND ST. LOUIS RAILWAY COMPANY v. KAIN.

EVIDENCE.—*Variance.*—A complaint against the P., C., and St. L. railway company, charging that a railroad corporation known as the C., C., and I. C. railway company killed an animal belonging to the plaintiff, and after the killing consolidated with another railroad company, and is now run and known as the P., C., and St. L. railway company, is not supported by the evidence, if the evidence fails to show the consolidation charged.

RAILROADS.—*Lease.—Liability for Torts.*—A railroad company, running and operating a railroad under a lease from another railroad company, cannot be held liable, either at common law or by virtue of the statute, for torts committed by the lessor prior to the execution of the lease.

APPEAL from the Lake Common Pleas.

WORDEN, J.—This was an action by the appellee against the appellant. The complaint charges, that in January, 1868, a railroad corporation known as the Chicago, Columbus, and Indiana Central Railway Company, by her locomotive and cars, ran upon and killed a horse of the plaintiff, in said county of Lake, at a point where the road was not fenced; that after the horse was killed, said last named company consolidated with another railway company, and is now managed and controlled by and under the company name of the Pittsburgh, Cincinnati, and St. Louis Railway Company.

The general denial was pleaded, and the cause was tried by the court, resulting in a finding and judgment for the plaintiff, a motion for a new trial being overruled.

The evidence clearly enough shows the killing of the horse by the Chicago, Columbus, and Indiana Central Railway Company, in the county mentioned, at a point where her road was not fenced; but it entirely fails to show the consolidation charged.

It shows, on the contrary, that the defendant is the lessee of the road-bed, rolling machinery, effects, and franchises of the Chicago, Columbus, and Indiana Central Railway Company, and is running and operating the same. The horse was killed before the making of the lease, and while the road was being operated by the lessor.

Under these circumstances the finding cannot be sustained.

Besides the variance between the proof and the allegation in respect to the relation of one company to the other, which perhaps might have been amended below and be deemed amended here, were there no other objection to the recovery, there is the fatal objection that the proof does not make a case that fixes any liability upon the defendant.

On general principles of law, the defendant cannot, by taking a lease of the road-bed, machinery, franchises and effects of the Chicago, Columbus, and Indiana Central Railway Company, become liable for the torts of the latter company committed before the lease. Nor do we think the statute on the subject of killing animals by railroad companies (3 Ind. Stat. 413) fixes upon the lessee any liability for animals killed by the lessor before the execution of the lease.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

E. Walker, for appellant.

BLEDSOE and Others, *v.* IRVIN.

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142 557
35 293
160 117

PLEADING.—*Abatement.*—In a suit on a joint contract, all the makers thereof must be joined as parties defendants, and the failure of the plaintiff to join any one is cause of demurrer, if it appear on the face of the complaint; if it does not so appear, it may be taken advantage of by plea in abatement.

SAME.—*Plea in Abatement.*—It is not necessary that a plea in abatement should show in what manner a joint maker of a contract became a maker.

APPEAL from Bartholomew Common Pleas.

BUSKIRK, J.—The action in the Common Pleas Court of Bartholomew county, from which this appeal was taken, was to obtain judgment on a note, and to foreclose a mortgage given to secure the same.

The only question arising in the case is upon the sustaining of a demurrer by the court below to the answer in abatement. The note upon which the action was brought was signed as follows: "L. S. Bledsoe, E. H. Cox & Co., Samuel Stuckey."

The answer in abatement above referred to, was as follows, after entitling the cause, viz.: "Defendants, for answer in abatement herein, say that plaintiffs ought not to maintain said action, because, they say that the said note in said declaration mentioned (if any such was made), was made by one Elizabeth Kinney jointly with said defendants, and not by said defendants alone, and that said Elizabeth Kinney is still living, to wit, at said county of Bartholomew, State of Indiana; wherefore, because said Elizabeth Kinney is not named in said complaint, nor made a party defendant in this action, they pray judgment herein that said action abate.

(Signed,) L. S. BLEDSOE.

Subscribed and sworn to March 22d, 1869.

G. W. RICHARDSON, N. P.

To this a demurrer was filed, for the alleged reason that it did not state facts sufficient to constitute a defense. This error we think is fatal to the judgment below. The note on its face is a joint note. At common law, all makers of a

joint contract must have been joined as parties defendants, and the failure of plaintiff to join any one was cause of demurrer, if it appeared in the complaint, and of plea in abatement if it did not so appear. Such was the uniform ruling of this court; *Bragg* v. *Wetzel*, 5 Blackf. 95; *Dillon* v. *The State Bank*, 6 Blackf. 5; *Wilson* v. *The State*, 6 Blackf. 212, and authorities cited in the last two cases; *Gilman* v. *Rives*, 10 Pet. 298. Nor has the code changed the rule. 2 G. & H. 46, sec. 18; id. 79, clause 4, and note thereto.

Even if this case were to be considered as embraced within the principle laid down in *Goodnight* v. *Goar*, 30 Ind. 418, that "the code seems to have re-enacted the rules which prevailed in courts of equity, as to who must join as plaintiffs, and may be joined as defendants," still the plea in abatement in this action, under equitable rules, was good. The answer was pleaded by all the defendants who had been summoned, including Stuckey, whom the record shows to have been a surety on the note. As such he had rights over against all the other makers of the note, in the event of his having anything to pay thereon; and in all cases of that character, it is said to be the rule in equity, that all parties so consequentially liable, must be brought before the court. 1 Daniell's Ch. Prac. 329. And in accordance with this principle, is the decision of *Hardy* v. *Blazer*, 29 Ind. 226, and also in *Braxton* v. *The State*, 25 Ind. 82.

But it is insisted by the appellee, that the ruling of the court was not erroneous, for the reason that the plea in abatement was defective in not showing how and in what manner Elizabeth Kinney had become a maker of the said note. The plea alleged that she was a joint maker of the note, and the demurrer admitted that this was true. Pleadings should contain facts and not evidence. We think the court erred in sustaining the demurrer to the plea in abatement.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the

demurrer to the plea in abatement, and for further proceedings not inconsistent with this opinion.

R. Hill and *G. W. Richardson*, for appellants.

F. T. Hord, for appellee.

PORTER and Another *v.* SILVERS.

PRACTICE.—*Assignment of Error.—Motion to Strike Out.*—The refusal of the court to strike out a portion of a paragraph of pleading cannot be assigned for error.

SAME.—*Demurrer.*—Where a demurrer is not set out in the record, no question with reference to a ruling upon it can be presented in the Supreme Court.

PLEADING—A judgment will not be reversed on account of the improper sustaining of a demurrer to a paragraph, or to several paragraphs, of an answer, when the same matter is admissible in evidence under the remaining paragraphs of the answer.

AGENT.—*Commissions.*—If an agent does not perform his duties, or is guilty of gross negligence, or gross misconduct, or gross unskilfulness, he not only becomes liable to his principal for the damages the latter may have sustained, but he also forfeits all claims to commissions.

APPEAL from the Howard Circuit Court.

DOWNEY, C. J.—Silvers sued Porter & Mills, who were real estate agents, to compel them to account for the proceeds of real estate belonging to him, which they had sold under his employment.

The complaint contains two special paragraphs, and also a paragraph for money had and received. The defendants moved the court to strike out parts of the first and second paragraphs of the complaint, which motion was overruled, and this is assigned as the first error. But there was no proper exception to this ruling of the court, and we cannot, therefore, re-examine it. See *Miller* v. *Deaver*, 30 Ind. 371, where it is held that this cannot be assigned for error. There

was a demurrer by the defendants to each paragraph of the complaint, which was overruled, and this is the second error complained of. But this demurrer is not set out in the record, and therefore there is no question before us with reference to it.

The defendants then answered in four paragraphs. A demurrer was sustained by the court to the second and third, and overruled as to the fourth; and this action of the court constitutes the ground of the third assignment of error.

We do not see any good objection to the second or third paragraph of the answer, but we think the same matter set up in these paragraphs was admissible either under the general denial or under the fourth paragraph of the answer, on which issue was taken by general denial, and was actually admitted and considered under these issues.

This court will not reverse a judgment on account of the improper sustaining of a demurrer to a paragraph, or to several paragraphs, of an answer, where the same matter is admissible under the remaining paragraphs of the answer.

The fourth alleged error is the refusal of the court to grant a new trial, on the ground that the evidence is insufficient to sustain the verdict.

There were two theories of the case; each party sustained his own theory in the pleadings and by his evidence. The court, in what seems to us to have been a full and fair examination of the facts of the case, adopted the theory of the plaintiff, and found for him, refusing to set aside the finding on a motion for a new trial.

It is contended by counsel for the appellants, among other things, that the amount of the judgment is too large. But if the jury added interest to the amount of their finding, which they might do if they thought proper to do so, the amount is not too large, even after deducting the compensation which the plaintiff testified the defendants were to receive.

If no allowance for services had been made by the court, we are not prepared to say that the judgment should have been reversed on that account. If an agent does not per-

form his duties, or is guilty of gross negligence, or gross misconduct, or gross unskilfulness, he not only becomes liable to his principal for the damages which he may have sustained, but he also forfeits all claim to commissions. Story Agency, sec. 331, *et seq.*, and authorities cited. The allegations of fraud and gross misconduct made by the plaintiff against the defendants having been found by the court to be true, the court might have withheld any allowance to the defendants as commissions. We cannot interfere.

The last error assigned is, that the court erred in rendering final judgment for the plantiff against the defendants.

There is nothing in this assignment. Judgment follows as a legal and logical consequence, where the verdict of the jury or the finding of the court is not set aside.

The judgment is affirmed, with five per cent. damages and costs.

J. W. Robinson, for appellants.

M. Bell and *A. S. Bell*, for appellee.

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127 [redacted]
35 297
144 101

BARKER *v.* BUELL.

MECHANIC'S LIEN.—*Pleading.—Complaint.*—Complaint by A. against B., alleging that the defendant and one C. owned certain town lots, and were erecting a new brick building thereon; that the plaintiff sold and delivered to one D., who was a sub-contractor of B. and C., brick to be used in the building, and which were so used, and which were not paid for; that within sixty days after the completion of the building, plaintiff filed in the office of the recorder notice in writing of his intention to hold a lien on the lots and building for the amount due for the brick, which notice was duly recorded, a copy thereof being made part of the complaint; and that C. had sold and conveyed his interest in the lots to B. Prayer that the lien be enforced and the property sold, &c.; the suit being instituted within one year, &c.

Held, that the complaint was good on demurrer.

SAME.—To give a person furnishing materials for a new building a right to acquire a lien on the building and real estate, to the extent of the value of the materials furnished, it is not necessary that the materials should be furnished to the owner of the real estate who is erecting the building or to his imme-

diate contractor; but section 647 of the code, as qualified by section 648, gives such right to any person furnishing materials for a new building to a sub-contractor.

SAME.—Section 649 of said act has no application to liens; the notice provided for in said section, to be given to the owner of the property, is in order to fix a personal liability upon the owner, and is not necessary in order to acquire a lien.

APPEAL from the Newton Circuit Court.

WORDEN, J.—Complaint by the appellant against the appellee, alleging, in substance, that on or about the 1st of July, 1869, the defendant and one Gilbert Goff were the owners of certain lots therein described, in the town of Kentland, in said county of Newton, and were then erecting thereon a new brick building; that on the day aforesaid, the plaintiff sold and delivered to one John Burns, who was then and there a sub-contractor of said Buell and Goff, eighty-four thousand and forty-two brick, to be used in the construction of said building, which were used therefor by said sub-contractor, Burns; that the brick were of the value of six dollars and a half per thousand, for which they were sold to Burns, making in all the sum of five hundred and forty-six $\frac{27}{100}$ dollars; that Burns paid thereon the sum of fifty-seven $\frac{43}{100}$ dollars, the residue remaining unpaid; that the building was completed on or about the 1st of September, 1869; that within sixty days thereafter, to wit, on the 1st day of September aforesaid, the plaintiff filed in the office of the recorder of said county notice in writing of his intention to hold a lien upon the lots and building for the amount of his claim as aforesaid, which notice was duly recorded, &c. A copy of the notice is set out and made a part of the complaint, and appears to be in all respects sufficient. The complaint further alleges that on the — day of ———, 1869, the said Gilbert Goff sold and conveyed his interest in said lots to the defendant, Buell, who is now the sole and exclusive owner thereof. Prayer that the plaintiff's lien be enforced, and the property be sold, &c., and for other proper relief. The suit was instituted within a year from the furnishing of the brick and the completion of the building.

A demurrer was sustained to the complaint for the want of a statement of sufficient facts to constitute a cause of action, the plaintiff excepting; and final judgment was rendered for the defendant.

The only question before us is that presented by the ruling of the court on the demurrer.

It is earnestly insisted by the appellee that even if the plaintiff were otherwise entitled to acquire and enforce a lien on the property for brick sold to Burns, the sub-contractor, yet that, inasmuch as he failed to give the defendant notice. as is contemplated by the amended six hundred and forty-ninth section of the statute on the subject (3 Stat. Ind. 335), he has not acquired, and therefore cannot enforce, any lien.

This also seems to have been the view of the court below. The question is not entirely free from difficulty, and must depend upon the construction of the statute on the subject. For the purpose of convenience we here bring together and set out the entire statute on the subject, as amended. The sections not amended are found in 2 G. & H., commencing on page 298; and the amended sections are found in 3 Ind. Stat., commencing on page 335.

"Sec. 647. Mechanics, and all persons performing labor, or furnishing materials for the construction or repair of any building, or who may have furnished any engine or other machinery for any mill, distillery or other manufactory may have a lien separately or jointly upon the building which they may have constructed or repaired, or upon any buildings, mill, distillery, or other manufactury for which they may have furnished materials of any description and on the interest of the owner in the lot or land on which it stands, to the extent of the value of any labor done or materials furnished, or for both.

"Sec. 648. The provisions of this act shall only extend to work done or materials furnished on new buildings, or to a contract entered into with the owner of any building for repairs, or to the engine or other machinery furnished for any mill, distillery or other manufactory, unless furnished to the

owner of the land on which the same may be situate, and not to any contract made with the tenant, except only to the extent of his interest.

"Sec. 649. Any sub-contractor, journeyman, or laborer employed in the construction or repair, or furnishing materials for any building, may give to the owner thereof, or, if said owner is absent, to his agent in charge of said building or repairs, notice in writing, particularly setting forth the amount of his claim, and services rendered, for which his employer is indebted to him, and that he holds the owner responsible for the same; and the owner shall be liable for such claim, but not to exceed the amount which may be due, and may thereafter become due, from him to the employer, which may be recovered in an action whenever an amount equal to such claim over other claims having priority shall be due from such owner to the employer; and any sub-contractor, by giving notice as above, setting forth the amount of labor or materials he has engaged to perform or furnish in the construction or repair of such building, shall have the same rights and remedies against said owner for the amount of labor or materials performed or furnished after said notice as are above secured and provided for those who serve notice after the work is performed or materials furnished; and whenever an action is brought against an owner in pursuance of the provisions of this section, all sub-contractors, journeymen and laborers, who have performed labor or furnished materials, and given notices as herein required, may become parties to such action, and, if upon final judgment against such owner the amount recovered and collected shall not be sufficient to pay said claimants in full, the same shall be divided among them *pro rata.*

"Sec. 650. Any person wishing to acquire such lien upon any property, whether his claim be due or not, shall file in the recorder's office of the county, within sixty days after the completion of the building or repairs, notice of his intention to hold a lien upon such property for the amount of his claim, specifically setting forth the amount claimed;

and the recorder shall record the notice, when presented, in a book to be kept for that purpose, for which he shall receive twenty-five cents; and the liens so created shall relate to the time when the work upon said building or repairs began, and to the time when the person furnishing materials began to furnish the same, and shall have priority over all liens suffered or created thereafter, except other mechanics' and material men's liens, over which there shall be no such priority.

"Sec. 651. Any person having such lien, may enforce the same by filing his complaint in the circuit court or court of common pleas of the county where the work was done or materials furnished, at any time within one year from the completion of the work or furnishing the materials, or if a credit be given, from the expiration of the credit; and the court rendering judgment shall order the sale to be made, and the officers making the sale shall sell the property without any relief whatever from valuation or appraisement laws.

"Sec. 652. In such actions, all persons whose liens are recorded, as herein provided, may be made parties, and issues shall be made up, and trials had, as in other cases; and the court may, by the judgment, direct a sale of the land and building for the satisfaction of the liens and costs; such sale to be without prejudice to the rights of any prior incumbrancer, owner or other persons not parties to the action. If several such actions be brought by different claimants, and be pending at the same time, the court may order them to be consolidated.

"Sec. 653. If the proceeds of the sale be insufficient to pay all the claimants, then the court shall order them to be paid in proportion to the amount due each.

"Sec. 654. In all proceedings commenced under this chapter [article] the defendant may file a written undertaking, with surety, to be approved by the court, to the effect that he will pay the judgments that may be recovered, and

costs, and thereby release his property from the liens hereby created."

It will be seen that the case made by the complaint comes clearly within the provisions of section 647, as qualified by section 648. The brick were furnished and used for a new building. They were not furnished to the owners of the lots who were erecting the building, nor to their immediate contractor. It was not necessary that they should have been. They were furnished to a sub-contractor, and used in the erection of a new building, and this is all that was necessary, according to the terms of those two sections, to give the party furnishing them a right to acquire a lien on the building and lots to the extent of the value of the brick. And the plaintiff having filed in the recorder's office notice of his intention to hold such lien, and caused the same to be recorded, as provided for by section 650, his lien became complete and perfect, and he can enforce it, unless his rights are in some way modified by the other provisions of the statute, or unless something more was required of him in order to perfect his lien.

The entire enactment on this subject must be taken and construed together, and the intention of the legislature arrived at from an examination of each of its parts in connection with all its other parts.

Section 649 provides that any sub-contractor, journeyman or laborer employed in the construction or repair, or furnishing materials for any building, may give notice to the owner, &c., setting forth the amount of his claim and services rendered, for which his employer is indebted to him, and that he holds the owner responsible for the same; and the owner shall be liable for such claim, but not to exceed the amount which may be due, and may become due thereafter, from him to the employer, which may be recovered in an action whenever an amount equal to such claim over other claims having priority shall be due from such owner to the employer, &c.

We are of opinion that section 649 has no reference whatever to the subject of liens. It does not determine by whom,

or under what circumstances, a lien may be acquired, or what steps shall be taken to acquire it. It simply provides for fixing a *personal liability* upon the owner of a building under certain circumstances, and to a certain extent, and for enforcing the same by action. There is no allusion in the section to the subject of liens, but, on the contrary, its entire scope and effect, letter and spirit, are confined to personal liabilities, and the mode of fixing and enforcing them by action. It will be seen that the personal liability that can be fixed upon the owner of a building is less extensive than the lien that can be acquired against the property. The personal liability is limited to the amount that may be due, or may become due from the owner to the employer. Moreover, a party, in order to enforce his lien, must file his complaint therefor within one year from the completion of the work, or the furnishing of materials, or, where a credit is given, from the expiration of the credit (sec. 651), while there is no such limitation to the personal action provided for by section 649.

Inasmuch as section 649 has no application whatever to liens, either in respect to the circumstances under which they may be acquired, or to the manner in which they may be acquired or enforced, it follows that the notice therein provided for to the owner of property, in order to fix a personal liability upon him, is not necessary in order to acquire a lien. Section 650 provides for the notice to be given in order to acquire a lien, and none other is required for that purpose.

We are of opinion, on the facts stated in the complaint, that the plaintiff has a lien on the property, and that the demurrer should have been overruled.

The judgment below is reversed, with costs, and the cause remanded for further proceedings.

E. P. Hammond, *T. J. Spitler*, and *W. H. Martin*, for appellant.

R. S. Dwiggins, for appellee.

MENIFEE v. CLARK.

PRINCIPAL AND SURETY.—*Discharge of Surety.*—To discharge a surety on account of indulgence granted to the principal, the indulgence must be for a definite period of time, and founded upon a new consideration. There must be a new contract concluded between the creditor and the principal debtor, by which the hands of the former are tied for a definite period of time from suing the latter.

SAME.—*Consideration.—Agreement to Extend Time.*—Where A. and B. had been partners, and B. made a note to A., with C. as his surety, in a suit upon the note by an assignee of A., C. answered that when the note became due, and before the assignment to the plaintiff, and without his knowledge or consent, it was agreed between A. and B. that in consideration that B. should apply certain money in his hands to the payment of outstanding partnership debts of A. and B., the time of the payment of the note of B. to A. should be extended.

Held, that the agreement to apply the money in the hands of B. to the payment of the partnership debts of A. and B. was a sufficient consideration to support an agreement to extend the time of payment of the note; and a reply, that it was agreed between A. and B., at the time of the dissolution of the partnership, that B. should pay the debts, will not show the absence or want of consideration.

PLEADING.—*Demurrer.*—On a demurrer to a reply, the plaintiff may attack the answer, or the defendant the complaint, where either shows a want of jurisdiction, or where the facts stated are not sufficient.

APPEAL from the Marion Common Pleas.

DOWNEY, C. J.—Suit by the appellee against the appellant and one Turpin, on a joint promissory note, executed by them to one Pierson, and by him indorsed to the plaintiff. Turpin made default. Menifee answered, that he executed the note, but did so only as surety for Turpin; that when the note became due, and before the assignment thereof to the plaintiff, and without his knowledge or consent, it was agreed, by and between Pierson and Turpin, that, in consideration that Turpin should apply the money in his hands, to wit, four thousand dollars, in payment of the outstanding partnership debts of the late partnership, composed of said Turpin and Pierson, before that time dissolved by agreement of the parties, the time of payment of said note, on which

the action is brought, should be extended; and that in consideration of said extension, the said Turpin did apply said money in payment of said partnership debts, when, but for said agreement, he would have promptly paid the note sued on; and that Turpin has, since said agreement, become insolvent; wherefore defendant is discharged.

To this answer the plaintiff replied, first, by a general denial; second, that said pretended agreement was wholly without consideration, in this, that upon the dissolution of said partnership, Turpin agreed to pay the said firm debts; wherefore, &c.

The defendants demurred to the second paragraph of the reply, which demurrer was overruled, and the defendant excepted. There was a trial by the court; finding and judgment for the plaintiff.

The only error properly assigned is, that the court erred in overruling the demurrer to the second paragraph of the reply.

We all agree that the reply is bad. We think the answer discloses a sufficient consideration for the promise to extend the time of payment of the note, and that the additional fact disclosed by the reply does not show the absence or want of consideration. Though at the dissolution of the partnership Turpin agreed to pay the partnership debts, still Pierson was as much liable to the creditors of the firm as was Turpin, and it was, unquestionably, a great advantage to him to have the four thousand dollars applied to the discharge of the partnership debts and thus relieve him, to that extent, from liability therefor. And again, though Turpin had agreed to pay the firm debts, he had not agreed to apply to their payment the money which he then had in his hands. It may have been a serious inconvenience to him to apply that particular money to their payment. Either the advantage to Pierson, or the inconvenience to Turpin, constitutes a sufficient consideration for the alleged promise.

But while the answer is sufficient with respect to the con-

sideration alleged, is it good in other respects? It will be observed that it does not allege any definite time for which the extension was given. It states that, for the consideration mentioned, it was agreed that the time "should be extended," but for how long a time it does not state. We know that it is not material as to the length of time given. The suspension of the right of the creditor to sue for a month, or even for a day, is as effectual to release the surety as a year or two years. *Dickerson* v. *Board of Commissioners of Ripley Co.*, 6 Ind. 128. Reference is made in the opinion, in this case, to the case of *Fellows* v. *Prentiss*, 3 Denio, 512, where it is held that where one was surety for another, as guarantor, and after the debt was due, the creditor took the notes of the principal, without the knowledge and consent of the guarantor, at one, sixty, and ninety days respectively, the surety was discharged as to the whole debt. See also *Pipkin* v. *Bond*, 5 Ired. Eq. 91; *Bangs* v. *Strong*, 7 Hill, 250; *Okie* v. *Spencer*, 2 Wharf. 252. But it is equally well settled that the indulgence must be for a definite time.

In *The President of the Board of Police of Clarke Co.* v. *Covington*, 26 Miss. 470, Justice FISHER, in delivering the unanimous opinion of the court, says: "This was an action of assumpsit, brought in the Circuit Court of Clarke County, on a promissory note made by one Vance, as principal, and the defendants in error as securities, payable to the President of the Board of Police of said county. The defense set up is, that the plaintiff below, without the knowledge or consent of the sureties, extended the time of payment to the principal debtor.

"The proof is that a suit, which had been commenced, was dismissed by the president of the board, on the principal, Vance, delivering to said president a note made by one Carr for one hundred dollars, which was credited on the note of the defendants. It is not shown that the indulgence was given for any definite period of time.

"Upon this state of the case, a verdict was found for the sureties, upon which the court pronounced the proper judgment.

"The law is well settled, that to discharge a surety on account of indulgence granted to the principal, the indulgence must be for a definite period of time, founded upon a new consideration. There must be a new contract concluded between the creditors and the principal debtor, by which the hands of the former are tied for a definite period of time, from suing the latter. No such contract is shown in this case."

In *Draper* v. *Romeyn*, 18 Barb. 166, it is held thus: "It is a rule too well settled to admit of dispute now, that an extension of the time of payment for a single day, without the assent of the surety, will exonerate him. But this extension of credit must be founded on a consideration, and must be such an agreement as precludes the creditor from enforcing payment against the principal until the expiration of a specified period." See, also, *Wheeler* v. *Washburn*, 24 Vt. 293; 3 White & T. Lead. Cas., 561, 562; *Pierce* v. *Goldsberry*, 31 Ind. 52.

The answer being thus clearly defective, the next question is, can the plaintiff avail himself of that defect on the demurrer to the reply? In other words, will a demurrer to a reply extend back to a defective answer? That this was the rule at common law, there is no question; and such was the undisputed practice in this State, prior to the adoption of the code. As the code of practice originally stood, objections to the complaint were waived by failing to demur, &c., except only as to the jurisdiction of the court over the subject of the action. While this provision remained in force, this court had this question under consideration in several cases.

In *Johnson* v. *Stebbins*, 5 Ind. 364, HOVEY, Judge, in delivering the opinion of the court, after quoting the sections of the code on the subject of demurring, and referring to the New York Code and the decisions under it by the courts of that state, where it was held that the demurrer did extend back, said: "The cases all turned upon the clause not embraced in our section; and we think the doctrine clearly inferrible from these decisions is, that under our sections on

pleading, the demurrer cannot reach back through the pleadings, unless it be for the purpose of attacking the jurisdiction of the court."

In *Mason* v. *Toner*, 6 Ind. 328, where it was contended that the demurrer to the answer should go back to the complaint, STUART, Judge, said, "Our statute, it is urged, is *almost* a literal copy of the New York Code on the subject of demurrer; and in that state the demurrer reaches back to the first error in the pleading. Counsel have misled themselves by the word *almost*. It will be seen, on comparison, that our statute omits a very significant clause found in the New York Code. That omission is fatal to the position assumed here. The demurrer, we think, under our practice act, does not extend beyond the pleading to which it is addressed."

In *Freeman* v. *Robinson*, 7 Ind. 321, GOOKINS, Judge, in delivering the opinion, says: "The question arises on a demurrer to the reply, which, although it does not search the record for any other purpose, extends to the complaint for the purpose of attacking the jurisdiction of the court over the subject," &c.

In *Gimbel* v. *Smidth*, 7 Ind. 627, STUART, Judge, said, "But we have several times held, after examining the point with great care, that under our new practice a demurrer does not reach back through the pleadings, unless on a question of jurisdiction," &c.

Other cases might be referred to, decided by the court before the amendment of the section of the code in 1855. By that amendment it was provided that all objections to the complaint should be waived by failing to demur, except as to the jurisdiction of the court over the subject of the action, and except the objection that the complaint does not state facts sufficient to constitute a cause of action. Since this amendment this court has repeatedly decided that a demurrer to an answer will go back and attach itself to the complaint when thus defective; *Hayworth* v. *The Junction R. R. Co.*, 13 Ind. 348; *McEwen* v. *Hussey*, 23 Ind. 395. Other cases might be cited. Such has been the ruling in the State

of New York and in Kentucky, under codes similar, in this respect, to ours since its amendment. See *Johnson* v. *Stebbins, supra,* and cases there cited; and also *The People* v. *Booth,* 32 N. Y. 397; *Martin* v. *McDonald,* 14 B. Mon. 544.

Since, then, it is held that a demurrer to an answer will reach back to a complaint which shows a want of jurisdiction over the subject of the action, or which does not state facts sufficient to constitute a cause of action, what reason is there why a demurrer to a reply shall not go back to an answer which sets up some matter of which the court has no jurisdiction or which fails to state facts sufficient to amount to a defense? We shall probably be told that the code forbids it. Let us see whether it does or not.

GOOKINS, J., in *Freeman* v. *Robinson, supra,* held that a demurrer to the reply extended to the complaint, where the complaint showed a want of jurisdiction, which, as we have seen, was then the only objection not waived by failing to demur, &c. It seems reasonable to conclude that since the section is amended, the demurrer to a reply will go back to a complaint defective in either of the particulars not waived by failing to demur, &c.

The section of the code relating to demurring to the answer provides, that "where the facts stated in the answer are not sufficient to constitute a cause of defense, the plaintiff may demur to one or more of the several defenses, under the same rules and regulations as heretofore prescribed for demurring to the complaint. Unless the objection be taken by demurrer, it shall be deemed to be waived." 2 G. & H. 92, sec. 64.

It is the latter sentence of the section which is supposed to be in the way of the demurrer in going back from the reply to the answer. But it will be seen that though the objection to the answer is waived unless the objection be taken by demurrer, it is not required that the demurrer which is to raise the question must be addressed to the answer and be filed by the plaintiff. If the demurrer be interposed at a later stage of the pleading, the objection is taken by demur-

rer just as effectually as if it was addressed to the answer and put on file by the plaintiff.

The demurrer brings in review the whole series of pleading in all its preceding stages, and the court must give judgment against the party who has committed the first available fault. This was the well known practice or rule of pleading in use at the time of adopting the code; it has been held to apply, under the code, with reference to a defective complaint, even where the demurrer is to the reply, and we see no reason for a different rule with reference to a defective answer. The section above quoted says the plaintiff may demur to the answer, "under the same rules and regulations as heretofore prescribed for demurring to the complaint." This language must have some meaning attached to it in the construction of the section.

It is said, however, that this rule may operate badly in some cases, for the reason that if the demurrer had been directly to the answer, and the answer had been held to be bad, the party might have amended the answer. But this same objection would equally apply to holding a complaint bad on a demurrer to the answer. There is no greater hardship here than in the case of a successful motion for judgment on the pleadings, under section 372 of the code, which is rendered against the party whose pleading is defective, *non obstante veredicto*. If the party has no merits in his case, according to his own showing, he has no legal standing in court, and cannot justly complain if judgment is rendered against him.

This, however, is not a new question in this court. In the case of *Wiley* v. *Howard*, 15 Ind. 169, it is expressly decided, that the demurrer to the reply does reach back to the answer. In that case it is said, "The paragraph of the answer being bad, it was error to sustain a demurrer to the replication thereto, although the replication might have been bad had the answer been good." We are content to follow this precedent.

We hold, therefore, that according to the cases above

cited, on a demurrer to a reply, the plaintiff may attack the answer, or the defendant the complaint, where either shows a want of jurisdiction, as in *Freeman* v. *Robinson, supra*, or where the facts stated are not sufficient, as in *Wiley* v. *Howard, supra.*

This construction renders the rule uniform, and, we think, conduces to the proper administration of justice.

The answer in the case at bar being bad, in that it does not state facts sufficient to constitute a ground or "cause of defense," as the statute says, the decision of the court on the demurrer to the reply was correct, not because the reply was good, but because the answer was bad.

The judgment is affirmed, with costs.

PETTIT, J., regarding the answer as sufficient, not agreeing that the demurrer reaches back to the answer, and believing that the question does not arise on the assignment of error in overruling the demurrer, dissents on these points from the foregoing opinion.

W. Wallace, for appellant.

C. W. Smith, Jr., for appellee.

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SNYDER *v.* ROBINSON and Another.

SPECIAL FINDING.—*General Verdict.*—Where a general verdict is returned for the plaintiff, and answers to special interrogatories are also returned, and the answers exclude every conclusion that will authorize a recovery for the plaintiff, a judgment should be rendered for the defendant, notwithstanding the general verdict.

PAYMENT.—*Application of Payments.*—Where a purchaser of real estate encumbered by mortgages assumes the payment of a portion of the mortgage debts, as a part of the purchase-money, the amount so assumed becomes the personal debt of the purchaser; the residue is not the personal debt of the purchaser,

although he may be compelled to pay the same to save his property; and in such case a general payment made by the purchaser on the mortgage debts, will be applied to the portion for which he is personally liable.

APPEAL from the Tippecanoe Common Pleas.

WORDEN, J.—Action by the appellees against the appellant. Issue; trial by jury; verdict, with answers to interrogatories; and judgment for plaintiffs.

The claim of the plaintiffs was for money paid by them for the use of the defendant, to one Samuel Hamilton, on certain promissory notes executed by the defendant to Hamilton.

The answer of the defendant set up that the plaintiffs purchased of the defendant certain real estate for the consideration of thirty-five thousand dollars; that the property was encumbered with certain mortgages described and made exhibits A, B, C, and D, given to secure, amongst others, the notes in question; that as part of the consideration aforesaid the plaintiffs were to pay those mortgages to the amount of twelve thousand five hundred dollars. A written agreement was entered into between the parties, which was made a part of the answer and marked as exhibit E, by which the plaintiffs agreed, among other things, to pay on mortgages against the property thus purchased, as part of the consideration therefor, said amount of twelve thousand five hundred dollars. Reply in denial. There was a general verdict for the plaintiffs, assessing their damages at the sum of one thousand four hundred and thirty-two dollars and twenty-eight cents.

The following are the interrogatories propounded to the jury, with their answers thereto:

"1st. Did the plaintiffs execute the paper read in evidence, of which exhibit E made a part of the answer is a copy?" Answer. "Yes."

"2d. Did the plaintiffs, by said agreement E., assume to pay any part of the mortgages of which exhibits A, B, C, and D in the answer are copies?" Answer. "Yes, twelve thousand five hundred dollars."

"3d. Were all the notes paid by the plaintiffs some of

those secured by said mortgages A, B, C, and D?" Ans. "Yes."

"4th. What did those amount to which the plaintiffs paid, with interest to this date?" Ans. "One thousand four hundred and thirty-two dollars and twenty-eight cents."

The answers were all duly signed by the foreman.

Neither party moved for a new trial, but the defendant moved for judgment in his favor on the special answers to interrogatories, notwithstanding the general verdict, but his motion was overruled, and he excepted; and thereupon the court rendered judgment for the plaintiffs on the general verdict, and the defendant excepted.

We are clearly of opinion that the ruling of the court was erroneous, and that the judgment should have been rendered for the defendant. The answers to the interrogatories exclude every conclusion that would authorize a recovery.

By these findings it is clear that the plaintiffs, in making the payment of the notes, were but performing, in part, their agreement with the defendant in reference to the purchase-money for the property purchased by them. Money thus paid, in part or full performance, cannot of course be recovered from the defendant, unless some equitable ground exists for such recovery, which is not claimed or shown in the case. It is claimed, however, by the appellees that the notes paid by them were not a part of the twelve thousand five hundred dollars which they agreed to pay. The language of the agreement "E" in respect to payment of the purchase-money is as follows: "The parties of the second part" (the appellees) "pay for said property as follows, to wit: By cash in hand ten thousand dollars; by deed from John W. Goodman and wife to the said Irene Snyder" (wife of the appellant) "for property in said city valued at ten thousand dollars; by assuming mortgages on said opera house" (the property purchased by the appellees) "for ten thousand dollars; by assuming an additional mortgage, at the request of said Irene Snyder, for twenty-five hundred dollars, to Samuel Hamilton, of Hartford, Connecticut, payable three years from the date

thereof; by executing a mortgage to the said Irene Snyder, for twenty-five hundred dollars, payable one year from date thereof. * * * Said Goodman and Robinson agree to pay the mortgages and interest thereon according to the terms thereof, to keep up the insurance on said building, and keep said Snyder harmless."

It will be seen that the mortgages which the appellees assumed to pay are not, with one exception, specifically described in the agreement.

But the jury find that the mortgages which are made exhibits A, B, C, and D, are the mortgages on which the appellants assumed to pay the twelve thousand five hundred dollars, and that the notes paid by them are a part of the notes secured by those mortgages. The mortgages are all given to said Hamilton to secure notes executed by the appellant to him.

Now, assuming, without deciding, that the amount agreed to be paid by the appellees is insufficient to liquidate the four mortgages entirely, yet as the amount paid by them, as shown by the findings, falls very far short of what they assumed and agreed to pay, and no special application of the payment being made by either the appellant or the appellees, that is to say, there being no stipulation between them whether the payment made by the appellees should be applied in part discharge of the twelve thousand five hundred dollars which the appellees had assumed to pay, or to the residue of said mortgages, the question arises what application, as between the appellant and the appellees, the law will make of such payment.

Assuming, for the purpose of illustration, that the amount secured by, and due on, the four mortgages was eighteen thousand two hundred and fifty dollars, thus leaving a residue of five thousand seven hundred and fifty dollars, which the appellees did not agree to pay; then the twelve thousand five hundred dollars became the personal debt of the appellees; the holder of the mortgages could have sued them directly for it. *Bentley* v. *Vanderheyden*, 35 N. Y. 677. As

between the appellant and the appellees, the latter were principals in respect to the amount assumed by them. But they were in no manner bound for the supposed residue of five thousand seven hundred and fifty dollars. To be sure, the property was liable for the residue, and the appellees, in order to save the property, might have paid it and sued the appellant upon the covenants against encumbrances in his deed.

The sum assumed to be paid by the appellees was their personal debt; the residue was not their debt, though they might be compelled to pay it in order to preserve the property.

We are clear that, under the circumstances, the law will apply the payment thus made, as between the appellant and appellees, to the amount agreed to be paid by the latter, and not to the residue. The case of *Newman* v. *Meek*, Sm. & M. Ch. 331, in principle, is in point here. There N. was indebted to M. on his own account, and also as surety for Y.; N. made payments to M., without specifiying to which debt they were to apply. It was held that the law would apply the payments to N.'s own debt for which he was directly bound.

In 1 Am. Lead. Cas. 277, it is said, that "a general payment is always to be referred to * * * a debt due by the payor absolutely, and as principal, rather than to one due contingently and collaterally, or held as collateral security."

The judgment below is reversed, with costs, with instructions to the court below to render judgment in accordance with this opinion.

H. W. Chase and *J. A. Wilstach*, for appellant.

W. C. Wilson, for appellees.

DUNLAP *v.* MCNEIL.

PARTNERSHIP.—*Contract.*—A. and B. were partners. They dissolved partnership, and B. executed an agreement to A. that he would pay all the debts against the firm, and C. signed the agreement as surety for B.

Held, that the creditors of the firm were entitled to the benefit of the agreement, and that a creditor might maintain an action against B. and his surety for the amount of his debt.

APPEAL from the Fountain Common Pleas.

DOWNEY, C. J.—Dunlap brought an action in the court below against Scott McNeil, John R. McNeil, and Newton W. Davidson, alleging in his complaint that Scott McNeil and Davidson were partners; that they dissolved partnership; and that as a part of the consideration for so doing, the remaining partner, Scott McNeil, with John R. McNeil as his surety, executed the following agreement to Davidson, viz.:

"HARVEYSBURGH, Ind., Sept. 15th, 1868.

"I do hereby agree to N. W. Davidson to pay all debts against the firm of Davidson & McNeil.

SCOTT MCNEIL.

Security, JOHN R. MCNEIL."

It is further alleged that the firm of Davidson and McNeil, were, at the date of said agreement, indebted to John Dunlap, the plaintiff, in the sum of three hundred and twelve dollars.

The separate demurrer of John R. McNeil was sustained to the complaint, which presents the only question in this court. The brief of the appellee contains two propositions, viz.:

"1st. The contract of the appellee is one of guaranty.

"2d. A guarantor is only liable after the principal is exhausted."

We do not think that the contract is one of guaranty on the part of John R. McNeil, but of suretyship. See *McMillan* v. *The Bull's Head Bank*, 32 Ind. 11. Dunlap had the right to sue on the contract. It has been decided by

this court in *Davis* v. *Calloway*, 30 Ind. 112, that "a person for whose benefit a contract is made may maintain an action thereon." In *Devol* v. *McIntosh*, 23 Ind. 529, a case very much like this, it is held that the creditors of a firm are entitled to the benefit of a covenant from the remaining partner and his surety, to the retiring partner, to pay the debts of the firm.

We hold that there is no reason why John R. McNeil is not liable and should not have been a defendant, as well as his principal.

The judgment is reversed, with costs, and the cause remanded to the court below with directions to overrule the demurrer, and for further proceedings.

J. M. Rabb, for appellant.

T. F. Davidson, for appellee.

PIERCE *v.* GOLDSBERRY.

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EVIDENCE.—*Admissions.*—If a statement is made in the hearing of one, in regard to facts affecting his rights, and he makes a reply wholly or partially admitting their truth, then the declaration and the reply are both admissible in evidence as his admission.

SAME.—If a statement is made in the hearing of one, in regard to facts affecting his rights, and he makes no reply; if he hears and understands the statement, and comprehends its bearing, and the truth of the facts stated is within his own knowledge, and he is in such a situation that he is at liberty to make a reply, and the statement is made under such circumstances, and by such persons as naturally to call for a reply, if he did not intend to admit it, the statement is admissible in evidence as a tacit admission of the facts.

SAME.—In a suit by A. on a promissory note made by B. and C., where B. makes no defense, and C. appears and makes a separate defense as surety of B., a letter of B. written to A. is inadmissible as evidence against C.

APPEAL from the Tippecanoe Common Pleas.

BUSKIRK, J.—This is the second time this case has been in this court. It will be found reported in 31 Ind. 52. It

was an action on a note brought by the appellee against the appellant and one Thomas W. Loyed. Pierce made a separate defense. His answer consisted of three paragraphs. The first paragraph was withdrawn. The court sustained a demurrer to the second and third paragraphs of the separate answer of Pierce, and the case was appealed to this court, and the only error assigned was upon the action of the court in sustaining a demurrer to the answer of this appellant. The substance of these paragraphs was, that Pierce executed the note as the surety of his co-defendant Loyed, as was well known to the appellee; that after the maturity of the note, the appellee, without the knowledge and consent of the appellant, made an oral contract with the said Loyed, whereby the appellee, in consideration of the agreement of the said Loyed to pay him ten per cent. interest on the said note, agreed to and did extend the time of the payment of the said note for the period of ten days.

This court reversed the ruling of the court below, and held that the matters alleged in the second and third paragraphs of the separate answer of Pierce constituted a valid defense to the action on the part of the said Pierce.

The cause was remanded, and the court below, in obedience to the order of this court, overruled the demurrer to the answer, to which the appellee replied by a denial.

The cause was tried by a jury, resulting in a verdict for the plaintiff. The appellant made a motion for a new trial, which was overruled, and an exception was taken.

The principal errors relied upon are the admission of incompetent and the exclusion of competent evidence.

We will first consider the question of whether the court excluded legal and competent evidence. The appellant was examined as a witness. During his examination in chief, two questions were asked him and objected to by the appellee, which objection was sustained, and the evidence was excluded; to which ruling the appellant excepted. The exception is properly presented by bills of exception.

A proper understanding of the questions asked and ex-

cluded renders it necessary that we should give the substance of the testimony of the appellant down to the point where the questions were asked.

The appellant testified that he had executed the note in suit, as the surety of Loyed; that the first intimation he had that the note was unpaid was in the summer of 1869, more than two years after its maturity; that he received this information from Loyed, who was then residing at Lebanon, in Boone county, Indiana, and called upon him at his office in Lafayette; that Goldsberry afterwards called upon him, at the same place, and spoke to him about the note being unpaid; that he then stated to Goldsberry, that he had been informed by Loyed that when he had paid fifty dollars on the note, it had been agreed between him and Goldsberry, that he was to retain the balance of the money, and was to pay ten per cent. interest thereon, and that Goldsberry had agreed to give him thirty days notice before he should be liable to pay the balance due on said note.

He further testified, that he then told Goldsberry that he thought he had treated him badly, and asked him why he had done this, to which Goldsberry replied, that he had had all confidence in Loyed, to which he had answered that he hoped he would continue to have confidence in him; that he then stated to Goldsberry that he thought he had been released from all liability on the note by reason of his, Goldberry's, agreeing to extend the time of payment, and that he would leave the question to any lawyer, and if he was either legally or morally bound, he would pay the note; that they then went up to the law office of Mr. Davidson, to make their statement of the facts and to get his opinion upon the question of liability; that he, the appellant, did the most of the talking, and stated to Mr. Davidson, in the presence and hearing of Mr. Goldsberry, just the facts that he had testified to, as having been told him by Loyed and as he had stated them to Goldsberry before going to the office of Davidson; and that Goldsberry did not make any particular statement to Davidson, but permitted him to do the talking.

At this point, the appellant's counsel asked him the following question: "What, if anything, did the plaintiff say during the time you were making your statement to Mr. Davidson, or after you had finished it?"

The appellee objected to this question, and the objection was by the court sustained, and the evidence excluded, to which an exception was then taken. The appellant's counsel then asked him the following question:

"What objection, if any, did the plaintiff, Goldsberry, make to the statements so made by you to Mr. Davidson? State fully how he acted, and what exception, if any, he took to your statement." This question was also objected to, the objection sustained, and the evidence excluded, to which ruling an exception was then taken.

Was the above evidence competent and admissible? The sole controversy in the case was whether Goldsberry had extended the time of payment, upon a sufficient consideration, and without the knowledge or consent of the appellant, the surety. Goldsberry and Pierce met and conversed about the note. Pierce related to Goldsberry what Loyed had told him about the extension of time; they differed as to the law, and agreed to leave it to a lawyer; they went to his office, where Pierce, in the presence and hearing of Goldsberry, stated to Mr. Davidson what the facts were as he had learned them from Loyed and Goldsberry. The question is then asked, what did Mr. Goldsberry say or do? did he admit that the facts as stated by Pierce were true? or did he contradict the statement of facts made by Pierce and make one of his own? or did he remain silent? All of these matters were embraced in the two questions. If he admitted that the statement of facts made by Pierce was correct, such admission would be evidence against him, though not conclusive; if he denied the truth of the statement made by Pierce, such denial would be evidence in his favor and would tend to weaken the statement made by Pierce; if he made a statement of facts, such statement would have been admissible, and it would have been for the jury to determine

which was true; or if he remained silent under such circumstances as made it his duty to speak, then such silence would have been an implied admission of the truth of the statement made by Pierce.

Greenleaf states the rule thus: "Admissions may also be implied from the acquiescence of the party. But acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party. And whether it is acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or the language fully understood by the party, before any inference can be drawn from his passiveness or silence. The circumstances, too, must be not only such as afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply from men similarly situated." Greenl. Ev. 237, 238, sec. 197.

"The delarations of one party and the replies of the other, in a conversation had between the two, are evidence when proved in a cause. The jury may believe those of the one side and reject those of the other, if they, from all the circumstances, believe the one to be true and the other untrue." *Ball* v. *Clark*, 15 Ind. 370.

"To affect a party by evidence that a statement was made in his presence which he did not deny, the circumstances must appear to be such as called on him for a denial, if the statement was untrue." *Allen* v. *McKean*, 1 Sumner, 276, 313; *Carr* v. *Hilton*, 1 Curtis C. C. 390; *Commonwealth* v. *Kenney*, 12 Met. 235; *Melen* v. *Andrews*, 1 Moody & M. 336.

In *Commonwealth* v. *Kenney*, *supra*, the court say: "It depends on this: If a statement is made in the hearing of another, in regard to facts affecting his rights, and he makes a reply, wholly or partially admitting their truth, then the declaration and the reply are both admissible; the reply, because it is the act of the party, who will not be presumed

to admit anything affecting his own interest or his own rights, unless compelled to it by the force of truth; and the declaration, because it may give meaning and effect to the reply. In some cases where a similar declaration is made in one's hearing, and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts; first, whether he hears and understands the statement, and comprehends its bearing; and secondly, whether the truth of the facts embraced in the statement is within his own knowledge or not; whether he is in such a situation that he is at liberty to make any reply; and whether the statement is made under such circumstances, and by such persons, as naturally to call for a reply, if he did not intend to admit it."

These authorities are directly in point and are decisive of the question. No one can doubt that Goldsberry heard and understood what was said by Pierce, or that he was properly and naturally and by the highest considerations called upon and required to speak. The evidence should have gone to the jury.

We are next to consider whether the court erred in the admission of illegal and incompetent evidence. The court admitted in evidence over the objection of the appellant a letter that purported to have been written by Loyed, the principal in the note, to Goldsberry. Goldsberry stated that he had received the letter through the post office, from Loyed. There was no evidence that the letter was in the hand writing of Loyed, or that it bore the post marks, or was received in due course of mail. But there was a more serious objection to the admissibility of this letter than proof of its identity. Process was issued, but not served on Loyed; he did not appear in person or by attorney; he made no defense to the note. His declarations whether made on the street, or in a letter, were inadmissible against the appellant.

The court erred in the admission of such evidence.

The judgment is reversed, with costs, and the cause is remanded, with directions to the court below to grant a new

trial, and for further proceedings not inconsistent with this opinion.

Wallace & Hiett, for appellant.

SUMMERS and Others v. VAUGHAN and Another.

PLEADING.—*Answer.*—A paragraph of an answer pleaded to the whole cause of action, but answering only a part of it, is bad on demurrer.

WARRANTY.—If a sale of property is complete and perfect, by the terms of a written contract of sale, a subsequent warranty is void, unless some new consideration be given to support it.

EVIDENCE.—Where evidence is offered as a whole, and a part of it is not embraced in the pleadings and issues, it is not error to reject it.

APPEAL from the Henry Common Pleas.

WORDEN, J.—This was an action by the appellees against the appellants on promissory notes executed by the defendants to Bayless Vaughan & Co., and indorsed by the payees in blank to the plaintiffs.

Issue, trial, verdict, and judgment, for the plaintiffs, a motion for a new trial having been made by the defendants and overruled.

The second paragraph of the defendants' answer was as follows:

"And for a further answer, they say that the notes described in said complaint were given in part consideration for a portable saw mill, engine and boilers, with machinery thereto attached, which were purchased by the defendants of and from the plaintiffs' assignors, Bayless Vaughan & Co., and for no other or different consideration whatever; and that upon the sale thereof they, the said vendors, warranted the same to be in all respects perfect and complete, manufactured of good material and well put together, but the defendants in fact say that said machinery was not perfect, nor was the same well

put together; but, on the contrary thereof, the crown shield blew off, the boiler bursted, and said machinery was otherwise imperfect and deficient, and in consequence thereof, for the purpose of repairing the same, the defendants actually laid out and expended a large sum of money, to wit, the sum of five hundred dollars, in and about the repairing thereof, of which the said Bayless Vaughan & Co. had notice; and the defendants say that in consequence thereof said mill was stopped and could not be run for one hundred days, and if the same had been perfect as represented, and in good running order, they could have made a large sum of money, to wit, the sum of five hundred dollars; wherefore," &c.

To this paragraph of the answer a demurrer, assigning for cause that the same did not state facts sufficient, &c., was sustained, and exception taken.

This ruling constitutes one of the errors assigned.

The notes sued upon amounted to two thousand dollars, and the plaintiffs demanded judgment for that sum. The answer in question was defective, and the demurrer to it was correctly sustained, for the reason that it is pleaded in bar of the whole action, whereas at most it sets up facts that bar only one thousand dollars, viz.: five hundred for the expense of repairs, and five hundred for loss of time. That such an answer is bad, was decided in the following cases in this court. *Rose* v. *The North River Bank*, 11 Ind. 268; *Conwell* v. *Finnell, id.* 527; *Smith* v. *Baxter*, 13 Ind. 151; *Pratt* v. *Wallbridge*, 16 Ind. 147; *Webb* v. *Deitch*, 17 Ind. 521; *McDougle* v. *Gates*, 21 Ind. 65; *Louis' Adm'r* v. *Arford, id.* 235; *Richardson* v. *Hickman*, 22 Ind. 244. These decisions show conclusively that the demurrer was properly sustained.

The remaining question in the case is raised by an assignment of error on the refusal of the court to grant a new trial.

The ground on which a new trial was asked was that the court excluded certain evidence offered by the defendants.

It appears by a bill of exceptions that the contract for the

sale of the saw mill, &c., which was the consideration for the notes in suit, was in writing.

On the trial, the defendants offered to prove that after the execution of the written contract, but before the delivery of the mill, &c., and before the execution of the notes, the vendors warranted the machinery to be manufactured of good materials, and skilfully put together, and to be in all respects a first rate saw mill. This evidence was rejected.

We cannot say that the ruling was erroneous. It is assumed in the bill of exceptions and in the brief of counsel for the appellant that the sale of the mill and machinery was perfect and complete by the terms of the written contract. No written contract is set out in the bill of exceptions, nor in any manner identified, nor is the evidence in the record. The counsel for the appellants say in their brief, "It is not pretended that there was any warranty in that writing, but the appellants were attempting to prove another and different contract made some time subsequent," &c. Now, assuming, as is done in the bill of exceptions and brief of the counsel for the appellants, that by the terms of the written contract the sale of the mill and machinery was complete and perfect, a subsequent warranty is void, unless some new consideration be given to support it. "The consideration already given is exhausted by the transfer of the property in the goods without a warranty, and there is nothing to support the subsequent agreement to warrant, unless a new consideration be given." Benj. on Sales, 453; *Roscorla* v. *Thomas*, 3 A. & E. 234.

There is still another reason why the evidence was properly rejected. There was but one paragraph of the answer (the fourth) to which the evidence was at all applicable. That paragraph set up a warranty much less extensive in its terms than the one offered in evidence. It is alleged that "the vendors warranted the same to be perfect and complete, manufactured of good material, and skilfully put together." The warranty as offered in evidence embraced an important proposition not alleged in the answer, viz.: that

the mill was to be, in all respects, a first rate saw mill. The warranty offered in evidence was offered as a whole, and as a whole not being embraced in the pleading, there could be no error in rejecting it. Leave might have been given, in a proper case, to amend the pleading, but none was asked.

The judgment below is affirmed, with costs.

M. L. Bundy and *E. H. Bundy*, for appellants.

J. H. Mellett and *M. E. Forkner*, for appellees.

EWING and Others *v.* PATTERSON.

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COURT OF COMMON PLEAS.—*Jurisdiction.—Title to Real Estate.*—The court of common pleas has jurisdiction to foreclose mortgages, and the right to do so also confers the power to settle in such proceedings the title to the mortgaged premises.

PLEADING.—*Fraudulent Conveyance.—Evidence.*—To sustain an action by a judgment creditor to set aside conveyances alleged to be fraudulent, and to subject real estate held by the wife of the judgment debtor to the payment of the judgment, it is necessary to allege in the complaint, and to prove on the trial, that the judgment debtor does not possess other property subject to sale upon execution for the payment of the judgment.

SAME.—*Cross Complaint.*—The only difference between a complaint and a cross complaint is, that the first is filed by the plaintiff, and the second by the defendant. Both contain a statement of the facts, and each demands affirmative relief. In the making up of the issues and the trial of questions of fact, the court is governed by the same principles of law and rules of practice in the one case as in the other.

AMENDMENT.—Section 53 of the code (2 G. & H., 81), which provides for the amendment of pleading after a demurrer has been sustained, seems not to be discretionary, but imperative, and, in the absence of sham or frivolous pleading, a party should be allowed to amend.

APPEAL from the Wabash Common Pleas.

BUSKIRK, J.—This action was brought by John M. Patterson against John G. Ewing and Hannah M. Ewing, his wife, upon a note executed by Hannah M. and John G. Ewing, payable to John M. Patterson, for the sum of twelve hun-

dred dollars, and to obtain the foreclosure of a mortgage executed by the said Hannah M. and John G. Ewing to the said Patterson, to secure the payment of the said note.

On the 4th judicial day of the term, John Anspack, James M. Reed, Daniel Swar, Cornelius Sellers, and Charles Anspack, partners, doing business under the name, style, and description of Reed, Anspack & Company, and Abel Reed, and Daniel B. Miller, partners doing business under the name, style, and description of A. S. Scoville & Company, filed a sworn petition, alleging that they had an interest in and prior lien on the land described in the mortgage and complaint, and asking that they be made parties defendants, and permitted to defend the said action.

The petition was granted, and the above named persons were made parties defendants, who thereupon entered an appearance, and filed a cross complaint against Patterson and Ewing and Ewing. The cross complaint set out in detail the recovery of certain judgments in the Miami circuit court, the assignment thereon, the filing of transcripts in Wabash county, the issuing of executions, which judgments were against John G. Ewing and constituted, as was claimed, a prior lien on the land described in the mortgage. The cross complaint then alleges that the same premises described in the mortgage were on the — day of ———, 1866, purchased by the said defendant, John G. Ewing, with his own means, and that to defraud the said defendants answering, the said John G. Ewing caused the said premises to be conveyed by deed from one George W. Snidekar of that date to the said defendant Hannah M. Ewing, she at the time thereof knowing and participating in the same fraudulent design, and the said Hannah paying no part of the purchase-money aforesaid; and the defendants further answering, charge, that said mortgage sued upon in this action was by the said defendants, John G. and Hannah M. Ewing, given to the plaintiff, and by the plaintiff received with the fraudulent design of cheating, hindering, and delaying these answering defendants in the collection of their claims against said de-

fendant John G. Ewing, and that this suit is brought for the same fraudulent purpose. These defendants further say that there is due on their said judgment the sum of one thousand four hundred and eighty-one dollars and twenty-nine cents, and the interest thereon from the 26th day of October, 1869; and they ask that said deed from said George W. Snidekar to the said Hannah M. Ewing, and said mortgage from the said Ewings to the plaintiff be decreed null and void as to them, and that the said premises named in the said mortgage be decreed to be sold and the proceeds thereof be applied in satisfaction of these defendants' said judgment, and for all other and proper relief.

Upon the filing of the above answer in the nature of a cross complaint, the parties filing the same demanded of the court that this cause should be transferred to the circuit court of the said county for trial, for the reason that the title to real estate was put in issue, which deprived the common pleas court of jurisdiction. This demand was refused, and an exception was taken. The plaintiff then demurred to the cross complaint, which was sustained. The parties filing the answer asked leave of the court to amend the same, which leave was refused, to which an exception was taken by bill of exceptions. The defendants, John G. and Hannah M. Ewing, were then called, and failing to appear, were defaulted. The damages were then assessed by the court, and a personal judgment was then rendered against Hannah M. and John G. Ewing, and a decree of foreclosure of the mortgage; and upon failure to realize enough by the sale of the mortgaged premises to satisfy the said judgment, then an execution was to be levied upon the property of both the Ewings.

This appeal is presented by the parties who were admitted defendants and filed the cross complaint. Three errors are assigned; first, the refusal of the court to certify the cause to the circuit court; second, the sustaining of the demurrer to the cross complaint; third, the refusal of the court to permit the appellants to amend their cross complaint. The purpose of the cross complaint was to have a conveyance

and mortgage set aside as fraudulent, and to have the premises subjected to sale for the payment of the judgment of the appellants. There being no cross error assigned by the plaintiff below upon the action of the court in making the appellants defendants, we will assume that they were properly made defendants; and being defendants, they had the right to file their cross complaint, and the plaintiff below and the two Ewings having appeared to the cross complaint without objection, they will be regarded as having waived any objection that may have existed to their being made defendants and their right to attack the validity of the deed and mortgage.

The first error assigned presents for our decision the question whether the cross complaint ousted the common pleas of jurisdiction of this cause. The common pleas court has no jurisdiction of an original action brought to set side a conveyance as fraudulent, for the reason that the title to real estate is involved. See *Bray* v. *Hussey*, 24 Ind. 228; *Mason* v. *Weston*, 29 Ind. 561; 2 G. & H. 22, sec. 11.

But the court of commom pleas has jurisdiction to foreclose mortgages, and the right to do so also confers the power to settle, in such proceeding, the title to the mortgaged premises, for otherwise the jurisdiction would be frequently ousted. *Toner* v. *Mitchell*, 13 Ind. 530; *Denny* v. *Graeter*, 20 Ind. 20.

The court committed no error in refusing to transfer the case to the circuit court.

The next error assigned involves the question whether the court erred in sustaining the demurrer to the cross complaint. We think the ruling of the court was correct. There was a fatal defect in the cross complaint. It did not contain an allegation that John G. Ewing did not possess other property subject to sale upon execution for the payment of the judgments of the defendants. To entitle them to the relief prayed for, it was necessary for them to allege and prove the insolvency of John G. Ewing; for otherwise, they would have no right to complain of the fraudulent character of the

conveyance to Mrs. Ewing. As between Ewing and his wife, the conveyance was valid, but beween Ewing and his creditors, it would be invalid, if fraudulent, and he was destitute of other property with which to pay his debts.

The third error assigned is upon the refusal of the court to permit the appellants to amend their cross-complaint, after a demurrer had been sustained thereto.

The only real difference between a complaint and a cross complaint is, that the first is filed by the plaintiff and the second by the defendant. Both contain a statement of the facts, and each demands affirmative relief upon the facts stated. In the making up of the issues and the trial of questions of fact, the court is governed by the same principles of law and rules of practice in the one case as in the other. When a defendant files a cross complaint and seeks affirmative relief, he becomes the plaintiff, and the plaintiff in the original action becomes the defendant in the cross complaint.

The object of the code was to do away with the strict, inflexible, and technical rules of the common law, to the end that causes should be tried on their real and substantial merits, and not upon technicalities. Sections 97, 98, and 99 of the code contain very liberal provisions for the amendment of pleadings. 2 G. & H. 117, 118. The most of the amendments contemplated by these sections are to be allowed within the sound legal discretion of the court, and a judgment would not be reversed for the refusal of the court below to permit an amendment to be made, unless it was manifest that there had been an abuse of the discretion vested in the *nisi prius* courts.

But section 53 of the code (2 G. & H. 81) seems not to be discretionary, but imperative, in the absence of sham or frivolous pleading. Section 53 provides: "If the court sustain a demurrer, the plaintiff may amend by the payment of the costs occasioned thereby." Section 97 provides, that "any pleading may be amended by either party of course at any time before the pleading is answered. All other amendments shall be by leave of the court," &c.

Section 99 provides, that "the court may at any time, in its discretion," &c., allow certain amendments therein enumerated to be made.

Sections 64 and 67, 2 G. & H. 92, and 94, provide that demurrers may be filed to the answer or reply for the same causes, and under the same rules and regulations prescribed for demurring to the complaint. But whether section 53 is to be regarded as imperative or discretionary, we think that the court erred in refusing the appellants leave to amend their cross complaint. The pleading had not been amended. This was the first leave to amend that had been asked. There was no attempt to cause delay. There is no pretense that the pleading was sham. If it was, it was the duty of the court under section 77 to have rejected it, and not have sustained a demurrer. The court, by sustaining a demurrer to the cross complaint, recognized and treated it as having been filed in good faith, but as defective in the averment of facts.

The refusal of the court to permit the amendment to be made is attempted to be justified by a statement in the bill of exceptions that one of the attorneys of the appellants stated orally in open court in regard to the said demurrer, that they sought nothing in this proceeding but to subject the balance of the money realized on the sale of the said mortgaged premises to the payment of their claim against the defendant, John G. Ewing, which statement the said attorney immediately, upon consideration, withdrew, while still on the floor and addressing the court, and then and there asked leave of the court to amend said cross complaint.

We are clearly of the opinion that the statement of the attorney, taken altogether, constituted no excuse for the refusal of the court to permit the amendment to be made. It seems to have been a hasty and unadvised remark, and was immediately afterwards withdrawn. We think that the court erred in refusing the leave to amend. The question is not, perhaps, before us, but to avoid a similar mistake in the future, we suggest to counsel whether the personal judgment against Mrs. Ewing can be sustained either on principal or by authority.

The judgment is reversed, and the cause remanded, with directions to grant a new trial, and for further proceeding in accordance with this opinion.

L. H. Goodwin and *B. F. Williams*, for appellants.

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RAPP and Others *v.* MATTHIAS.

EXECUTOR.—*Sale of Real Estate by Foreign Executor.—Bond.*—In a proceeding for the sale of real estate in this State by a foreign executor, the sale is to be authorized in the same manner, and upon the same terms, as in the case of an executor appointed in this State, except that if it is shown that sufficient surety for the application of the proceeds has been given in the state or county where the executor was appointed, and a duly authenticated copy of such bond is filed in the court where the petition is made, no further bond will be required.

PETITION FOR SALE OF REAL ESTATE BY FOREIGN EXECUTOR.—The petition must show: 1st. What amount of personal property, if any, has come to his hands; 2d. The amount of the debts outstanding against the estate of the deceased, so far as the same can be ascertained, and the insufficiency of the personal estate to pay the same; 3d. A description of the real estate of the deceased liable to be made assets, showing the state and county where the same is located; 4th. The names and ages of the heirs, legatees or devisees of the deceased; 5th. That the executor has filed in the court an authenticated copy of his appointment; 6th. That the will of the testator has been duly probated.

WILL.—*Bequest for Life.—Heirs.—Children.*—A testator bequeathed all his real and personal property to his wife, "for her use and benefit during her natural life," and after her death all that remained unconsumed was to be sold, and one thousand dollars paid to his daughter S., and the balance was to be divided among the heirs of his daughter S., share and share alike; the wife to have the right to sell and dispose of said property, both real and personal, as she wished.

Held, that the wife took only a life estate.

Held, also, that the evident intention of the testator was to secure his widow a competency, and if it was necessary that she should sell the land, she might do so; but the balance of the estate unconsumed at her death she could not devise.

Held, also, that the word *heirs*, as used in the clause of the will which gave the estate, except one thousand dollars, to the heirs of his daughter S., meant *children*.

Held, also, that real estate purchased with the proceeds of the sale of the real estate

devised by the will to the wife for her life, after the death of the wife and the payment of the one thousand dollars to the daughter S., belonged to the children of S.

APPEAL from the Kosciusko Common Pleas.

DOWNEY, C. J.—The appellee, as executor of the will of Elizabeth Starris, deceased, filed his petition, stating therein that the personal assets of the estate amounted to about one hundred dollars; that the testatrix died seized in fee simple of the north fractional half of the north-west quarter of section three, and the north fractional half of the north-east quarter of section four, township thirty-four, range seven, except twenty-four acres off the west end of the north fractional half of the north-east quarter of section four, township and range aforesaid, and except a certain burying ground in the north-west corner of the said last named piece of land; that by the will of said testatrix said land was to be sold as soon as it legally could be sold; and that after the payment of all debts and funeral expenses, the balance was to be placed in the hands of the Trustees of the United Brethren in Christ of the Louisville Class, Nimiskillen township, Stark county, Ohio; said money to be held by said trustees or their successors forever, the interest to be used for the benefit of the poor of the Protestant churches residing in Nimiskillen township, Stark county, Ohio; said trustees shall determine who are the really poor, and give or pay out according to the best of their judgment; that said land is of the value of about three thousand dollars; that said testatrix left as her only child and heir, Sophia, intermarried with Joseph Rapp. The petition concludes with a prayer for the sale of said real estate, and is verified by the oath of the executor.

Sophia Rapp and Jacob Rapp demurred to this petition, on the ground that it did not state facts sufficient to constitute a cause of action, and their demurrer was overruled. On their own motion, Elias W. Rapp, Mary Rapp, Lydia Rapp, Elizabeth Rapp, Margaret Rapp, Caroline Rapp, Jacob Rapp, Jr., and David Rapp, children of Sophia and Jacob Rapp,

were made defendants to the action, and the last five of them being minors, a guardian *ad litem* was appointed for them.

Elias W. Rapp and the other children of Sophia and Jacob Rapp, the adults by attorney, and the infants by their guardian *ad litem*, answered jointly in three paragraphs; first, a general denial; second, that the plaintiff derived his title and right to sell said land by virtue of the will of said Elizabeth Starris, if he has any such right, and that said Elizabeth, at the time of making said will, and at the time of her decease, was the owner of a life estate only in the land set out in said will, and in plaintiff's complaint mentioned; that upon her death said land became the property of said defendants; and that she died on or about the — day of October, 1867; third, that on the 2d day of June, 1860, one Jacob Starris, then the husband of Elizabeth Starris, was the owner of certain real and personal estate in the county of Stark, and State of Ohio, of which county he was then a resident, and at said time and place he executed his last will and testament, filed as a part of this paragraph, in which will he devised to the said Elizabeth Starris, then his wife, a life estate in said real estate and personal property, and provided that all property received by her under said will which remained unconsumed by her at her death, should become and be the property of said defendants, share and share alike; that afterwards, in the year 1864, the said Jacob Starris died, leaving the said Elizabeth his widow, Joshua Yontz his executor, and said instrument in full force and effect as his last will and testament, which was legally admitted to probate in the said county of Stark; that afterwards his said executor sold the real estate in said county of Stark, of which said Jacob Starris died seized, and with the proceeds thereof the land set out in the will of Elizabeth Starris and in the plaintiff's complaint was purchased; that afterwards, on the 19th day of October, 1867, the said Elizabeth Starris died in said county of Stark; that she received from her said husband by virtue of said will property, other than that invested in the land in the complaint set out, sufficient to

comfortably support and maintain her during her life; and that such property did support and maintain her, and at her death she left out of said other property a surplus sufficient to pay all debts contracted for her support, and to pay all personal expenses; and that she left at her death said land so purchased with said proceeds of her husband's estate so unconsumed, and that the same is now the property of the defendants; wherefore they say that an order for the sale of said property should not be made.

The will of Jacob Starris, a copy of which is filed with this answer, is as follows:

"In the name of the benevolent Father of all, I, Jacob Starris, of the county of Stark, in the State of Ohio, do make and publish this my last will and testament, in manner and form following:

"First. I direct that my body be decently interred and my funeral conducted in a Christian-like manner.

"Second. I give, devise, and bequeath unto my beloved wife, Elizabeth Starris, all my real and personal estate in my possession, for her use and benefit during her natural life, and after the death of my wife, Elizabeth, said property, both real and personal, that may remain unconsumed, shall be appraised by three disinterested freeholders, and sold at private or public sale by my executor; and when final settlement is made by my executor, then I direct my executor to pay to my daughter Sophia, intermarried with Jacob Rapp, the sum of one thousand dollars, and the balance I direct to be equally divided, share and share alike, among the heirs of my said daughter Sophia.

"One thing yet; I direct that my wife shall have the right to sell and dispose of said property, both real and personal, if she wishes; and I also direct my wife to pay my debts and funeral expenses as soon as possible after my death; and lastly, I do hereby appoint my friend, Joshua Yontz, to be my executor of this my last will and testament."

The will was properly signed, attested, and probated.

The plaintiff demurred to the third paragraph of this an-

swer for the reason that it did not state facts sufficient to constitute a defense. The demurrer was sustained, and the point reserved by exception.

The defendants then moved the court to certify the case to the circuit court, on the ground that the title to real estate was in question; which motion was overruled. But this question is not properly reserved by bill of exceptions.

At this stage of the case, Joshua Yontz, the executor of the will of Jacob Starris, was made a defendant by agreement of the parties, and filed his answer as follows: first, a general denial; second, alleging the making of the will by Jacob Starris, his decease, the probate thereof, his appointment as executor; that he is yet acting as such; that he paid all the debts of said deceased and his funeral expenses, and delivered the property not used for these purposes over to the said Elizabeth Starris, to be used according to the will; that the land in Ohio was sold, and the money invested in the real estate in the complaint mentioned, as a safe investment of said money; that the widow received out of the estate of said Jacob Starris money and property, other than that invested in said land, sufficient to support and maintain her during her life, and which did so maintain her, and at her death she left more than enough money to pay the expenses of her last sickness and her funeral expenses; that she had no other title to said land than that derived from said will. A copy of the will of Jacob Starris is made part of this answer also. The plaintiff filed a demurrer to the second paragraph of this answer, which was also sustained and an exception taken.

Jacob and Sophia Rapp answered, first, that said Sophia is the daughter of said Elizabeth Starris, whose will is referred to in the plaintiff's petition, and Jacob Rapp is her husband, and they are her only heirs-at-law living at the time of her death; that she died in the month of July, 1867; that at the time of making said will by her, she was not of sound mind, but was insane, imbecile, and so weak in mind as to be incapable of making a will, and had no knowledge how she

desired to dispose of her property, but was wholly incapable of doing any business whatever at said time; second, they deny each and every allegation of the complaint.

The plaintiff replied to the second paragraph of the answer of Elias W. Rapp and others, by admitting that he claimed his right to sell said land by the will of said Elizabeth Starris, but denying that she was seized of a life estate merely in said property, and averring that she was seized thereof in fee simple. He also replied to the first paragraph of the answer of Sophia and Jacob Rapp, by a general denial thereof.

Upon these issues the case went to a jury, who returned a general verdict for the plaintiff and also answers to certain special interrogatories which were propounded to them.

There was a motion for a new trial made by the defendants, which was overruled; and judgment was rendered for the sale of the land, the plaintiff having filed an inventory and appraisement, and satisfied the court that he was bound by sufficient bond and security in the court in Ohio from which he received his appoinment as executor.

The first error assigned relates to the correctness of the action of the court in overruling the demurrer to the petition. As it appears elsewhere in the record that the will of Elizabeth Starris was executed and probated in the State of Ohio, and the petitioner there appointed as executor, we assume that this was intended as a proceeding by a non-resident or foreign executor for the sale of real estate, under sections 95, 96, and 97, 2 G. & H. 513 and 514. These sections are as follows:

"Sec. 95. When any executor shall be appointed without, and there shall be no executor within, this State, the testator not having been at the time of his death an inhabitant thereof, the executor so appointed may file an authenticated copy of his appointment in the court of common pleas of any county in which there may be real estate of the deceased, after which he may be authorized by such court to sell real

estate for the payment of debts or legacies, in the same manner, and upon the same terms, as in the case of an executor appointed in this State, except as hereinafter provided.

"Sec. 96. Whenever it shall appear to the court that such foreign executor is bound with sufficient sureties in the State or county in which he was appointed, to account for the proceeds of such sale for the payment of debts or legacies, and a copy of such bond, duly authenticated, shall be filed in such court, no further bond shall be required of him here; if, however, he is not thus sufficiently bound, he shall give bond in said court as is required of executors appointed in this State.

"Sec. 97. All proceedings by a foreign executor in respect to the sale of land shall be had in the court in which such authenticated copy of his appointment is first filed; and such court shall have exclusive jurisdiction to direct the sale of any lands of the testator situated in any county in this State."

In order to test the sufficiency of this petition, as the sale is to be authorized in the same manner and upon the same terms as in the case of an executor appointed in this State, we must refer to the sections by which executors appointed in this State obtain authority to sell the real estate of their testators.

Section 75, 2 G. & H. 506. provides what shall be shown by the petition. Looking to that, we find that the petition in this case is defective in several particulars; first, it does not state what amount of personal property, if any, has come to his hands as such executor. It does state that the personal assets of the estate amounted to about one hundred dollars, but does not show that they came to his hands, or what became of them; second, it does not show the amount of the debts outstanding against the estate of the deceased, so far as the same could be ascertained, and the insufficiency of the personal estate to pay the same; third, it gives no sufficient description of the real estate of the deceased liable to be made assets, &c. It is not shown to be in any county

in the State of Indiana, and for aught that appears may be out of the State; fourth, it does not state the names and ages of the heirs, legatees, or devisees of the deceased; it does state that the testatrix left, as her only child and heir, Sophia, intermarried with Joseph Rapp. But this does not fulfil the requirement of the statute.

Besides these objections, it seems to us that the petition should have shown that the executor had filed in court an authenticated copy of his appointment, as it was only after he had done so that he might be authorized to sell real estate of the deceased.

We are aware that this court has decided that, to enable a foreign executor or administrator to sue in this State, it is not necessary that he should first have filed an authenticated copy of his appointment; but this is under a different statute and does not affect the question before us. A former statute on that subject, which was construed in *Naylor* v. *Moody*, 2 Blackf. 247, was more like the statute now in question, and it was there held that the appointment must be filed and recorded before the executor or administrator could sue.

The petition does not show that the will of the petitioner's testatrix had been probated anywhere. Unless it had been, he could not sell land under its provisions, or legally record letters testamentary.

A more important and vital question in the case is as to the proper construction of the will of Jacob Starris, under which the petitioner's testatrix claimed. What was the quantity of her estate in the property left by her deceased husband, according to his will? Was it an estate of inheritance, or not of inheritance? a life estate, or a fee simple? Were it not for the latter clause of the will, it would be entirely clear that she took only a life estate. But it is contended, and the common pleas held, that the clause giving her power to sell and dispose of the property had the effect to give her a fee simple. We do not think so. Had she seen fit to sell the real estate, she had the right to do so, and the purchaser would have obtained a good title to the same. But, in

fact, she did not sell it, but it was sold by the executor. We think, whether the land was sold by her or by the executor, the part of the estate left unconsumed at her death went by the will to other parties, and could not be devised by her. The fact that the land mentioned in the will of Jacob Starris was sold by the executor, and the money derived from it invested in the land in question, does not give to Elizabeth Starris any better claim to it than she had to the lands left by her husband. The evident intention of the husband was to secure his widow a competency, and if it was necessary thereto that she should sell the land, she might do so, but the balance of the estate unconsumed at her death she could not devise.

A question of some interest arises on that part of the will which gives the estate except one thousand dollars to the "heirs" of Sophia Rapp. Sophia Rapp was living, and *nemo est hæres viventis.* But we conclude that the word heirs in this will was intended to mean children, and that therefore the children of Sophia Rapp are the owners of the part of the estate in question.

It appears that twenty-four acres of the land purchased with the estate of Jacob Starris, and conveyed to Elizabeth Starris, were conveyed by her to Sophia Rapp, in payment of the one thousand dollars given to her by the will, and the balance of the tract is the land sought to be sold.

There are other questions argued, but we need not examine any more of them.

The judgment is reversed, with costs, and the cause remanded.

M. J. Long, *E. V. Long*, and *S. J. North*, for appellants.

G. W. Frazier, *H. S. Riggs*, and *E. A. Haymond*, for appellee.

HARVEY v. SINKER and Others.

DEPOSITION.—*Motion to Suppress.—Bill of Exceptions.*—The correctness of a ruling upon a motion to suppress a deposition is not legitimately presented, unless the deposition, motion to suppress, and affidavit upon which it is, in part, based are made a part of the record by a bill of exceptions.

APPEAL from the Howard Common Pleas.

WORDEN, J.—Suit by the appellees against the appellant on a note. Trial, verdict, and judgment for the plaintiffs.

There is no question made in the cause whatever, except the correctness of the ruling of the court in overruling a motion to suppress certain depositions. But there is no bill of exceptions in the cause whatever. The clerk, it is true, has set out certain depositions in the transcript of the record, together with the written motion to suppress, and the appellant's affidavit on which the motion was in part founded, and also a statement that the court overruled the motion to suppress, and that the appellant excepted. It is too clear to require the citation of any authorities that the depositions and the affidavit on which the motion to suppress was, in part, based, can only be made a part of the record by bill of exceptions. The question sought to be raised is not legitimately before us.

The judgment below is affirmed, with costs and five per cent. damages.

J. W. Evans, for appellant.

A. F. Shirts, for appellees.

VINNEDGE and Others v. SHAFFER.

35b 341
142 239

35b 341
146 401

35b 341
149 218
149 420

MARRIED WOMAN.—*Conveyance of Real Estate.—Mortgage.*—A woman, during a second or subsequent marriage, cannot alienate or mortgage real estate received and held by her in virtue of a previous marriage.

APPEAL from the Tipton Common Pleas.

WORDEN, J.—Suit by the appellants against the appellee to foreclose a mortgage executed by the defendant and her husband, Noah N. Shaffer, to the plaintiffs, to secure the payment of certain promissory notes.

The defendant Delia answered, amongst other things, in substance, that in the year 1856, she was married to one Robert F. Tudor, by whom she had four children, all of whom are living; that Tudor died in the year 1862, seized in fee of the mortgaged premises, leaving the defendant as his widow, and the aforesaid children; that since the death of Tudor, she and said children have held said property as tenants in common; that in 1869 she intermarried with the said Noah N. Shaffer and is still his wife, and that the property mortgaged (one undivided third of the entire tract) descended to her as aforesaid from her former husband, Robert F. Tudor. The mortgage on its face purports to have been executed by the defendant and her husband, Noah N. Shaffer.

To this answer a demurrer was overruled, and the plaintiffs declining to reply thereto, final judgment was rendered for the defendant.

The decision below, we think, was right. The 18th section of the statute of descents (1 G. & H. 294) provides, that "if a widow shall marry a second or any subsequent time, holding real estate in virtue of any previous marriage, such widow may not, during such marriage, with or without the assent of her husband, alienate such real estate, and if, during such marriage, such widow shall die, such real estate shall go to her children by the marriage in virtue of which such real estate came to her, if any there be."

This statute ties up the hands of a woman during a second or subsequent marriage, and restrains her, during such marriage, from alienating real estate received by her in virtue of a former marriage. The restraint upon alienation, by the terms of the statute, is as absolute where there are no children of the marriage in virtue of which she received the property, as where there are. The object of the statute seems

to be two fold, first, to protect a woman who has thus received real estate by virtue of a former marriage from improvident and injudicious alienations thereof during a second or subsequent marriage, and second, to preserve the property for the children of the marriage in virtue of which she received it, where there are such children, in case of her death during such second or subsequent marriage.

The argument is pressed upon our consideration that the sole object of the statute is to preserve the property for the children of the marriage in virtue of which she received it; and hence that she may in a qualified sense alienate it, viz.: that she may alienate her life estate therein, and the fee conditionally, not thereby in any way interfering with the rights of the children of the marriage in virtue of which she received the property, should there be such children living at her death, and should she die during such second or subsequent marriage. What we have already said, if we are right in our conclusions as to the spirit and objects of the statute, disposes of this argument. We are of opinion that both the letter and spirit of the statute in question prohibit any alienation of the property, whether for life or in fee, absolutely or contingently, by a woman, under the circumstances stated.

A mortgage is in some sense an alienation and fairly within the prohibition of the statute. If a woman could thus mortgage property, it would in many cases, and might in all, be an indirect mode of alienation, and the maxim of law would be violated, that what cannot be done directly cannot be done indirectly.

The judgment below is affirmed, with costs.

J. W. Robinson, for appellants.

J. Green, *D. Waugh*, *E. A. Overman*, and *N. R. Overman*, for appellee.

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141 699

GILMORE v. THE BOARD OF COMMISSIONERS OF PUTNAM CO.

TRIAL BY REFEREES.—Before there can be a reference for trial, there must be an action pending; and there can be no action pending unless there are adversary parties.

ACTION.—The filing of a claim against a county before the Board of Commissioners does not constitute an action, and there can, in such case, be no reference for trial.

ARBITRATION.—*Reference.*—The appointment of a committee by the Board of County Commissioners, to examine the books and accounts of a county treasurer who presents a claim for services, and to report whether there is any money due the treasurer, does not amount to a submission to arbitrators, or a reference to referees, and the report of a committee so appointed is not binding, either upon the county or the claimant.

TRIAL BY REFEREES.—A trial by referees is conducted in the same manner as a trial by the court. They may be required to state the facts and conclusions of law separately; otherwise they may render a general finding.

SAME.—*Report of Referees.*—The report of referees stands as a general finding by a court, or as the special verdict of a jury, and the finding in the one case, and the verdict in the other, must be followed by a judgment thereon, or they will amount to nothing.

PLEADING.—*Complaint.—Settlement.*—Where a complaint is based upon an alleged settlement, a balance struck, and a promise to pay the balance; and the exhibits filed with the complaint contradict the allegations, and conclusively show that there has been no settlement and no promise to pay, the complaint will be bad on demurrer.

APPEAL from the Putnam Common Pleas.

BUSKIRK, J.—The complaint in this action originally consisted of three paragraphs, but the appellant, in the court below, dismissed the first paragraph. The second paragraph of the complaint alleges, in substance, that the appellant, on the 4th day of June, 1868, presented to the Board of Commissioners a petition, in which he represented that he had been the treasurer of said county during the years 1855, 1856, 1857, and 1858; that there was due him from said county the sum of three thousand dollars for services rendered by him as such treasurer for said county, for which he had failed and neglected to charge the said county, and that the same still remained due and unpaid; that upon the presentation of such claim, the board of commissioners

made and entered upon their records an order, in these words:

"John Gilmore v. Putnam County. Comes now John Gilmore, and presents his claim for fees accrued during his term of office as county treasurer, and neglected to be charged up to the county at that time; and the board, being sufficiently advised, do appoint James J. Smiley, Jonathan Birch, and John A. Cruse, a committee to examine the books of the treasurer's office, and ascertain if any moneys are due the said Gilmore. The expenses of said committee to be paid by said Gilmore;" that the said committee submitted to the board of commissioners a detailed and itemized statement of the services performed by the said Gilmore, for which he received no pay, and the value thereof, and closed with the following recommendation, namely: "And your committee are of the opinion that the above claims are equitable and just, and we recommend the allowance of the same;" that the said board of commissioners rejected the said claim, and refused to allow the same or any part thereof; that the action of the said board of commissioners in appointing the said committee, with directions to examine and report what moneys were due the appellant, amounted to a submission of the said claim to referees; and that the report of the said committee was the award of the said referees, and is binding upon the said board of commissioners, as the award and decision of referees.

The third paragraph alleges, in substance, that the board of commissioners of said county, being indebted to the plaintiff, an accounting and settlement took place, and that upon such accounting there was found due to the plaintiff the sum of two thousand and twenty-four dollars and forty-four cents, which the board promised to pay; and there was filed with and made a part of the said paragraph, the claim of the plaintiff as presented to the board of commissioners, the order of the board appointing the committee mentioned in the second paragraph, and the report of the committee.

The appellee demurred to the second and third paragraphs

of the complaint. The demurrer was sustained. The appellant refused to amend, and judgment was rendered on demurrer. There was an exception to such ruling, and this is assigned as error in this court. The only question raised by the record is, whether the action of the court in sustaining the demurrer to the complaint was correct.

This action is not based upon the indebtedness of the county to the appellant, nor does he seek to recover upon such indebtedness, as a legal claim. In the second paragraph, he relies upon an agreement to refer the claim to referees and their report, while in the third paragraph he relies upon a settlement. It is not claimed in the complaint that there was an arbitration and award, either at common law or under the statute, but it is expressly averred that the claim was, by the agreement of the parties, submitted to referees. It is claimed, in argument, that it was an arbitration at common law. The allegations of the complaint are binding upon the appellant, and should be regarded by us instead of his argument. The question then is, was there a reference to, and a trial by, referees, under sections 349, 350 and 351 of the code, 2 G. & H. 210, 211.

Before there can be a reference, there must be an action pending. There can be no action unless there are adversary parties. When there is an action pending between adversary parties, all or any of the issues involved in such action, either of fact or of law, or both, may be referred, upon the written consent of the parties. The filing of a claim against a county before the board of commissioners, does not constitute an action, and there could be, in such case, no reference. If the appellant had, instead of filing his claim for allowance before the board of commissioners, commenced an action against such board in the circuit or common pleas court, there would have been an action pending between adversary parties, who possessed the legal capacity to submit the same to arbitration, or refer it to referees for trial. But suppose there was an action pending in such a form, and in a court, where there could have been either a submis-

sion to arbitration or a reference to referees, do the facts set out in the second paragraph of the complaint show that there was either a submission or reference, or that there was either an award or a report? We think they do not. The facts stated do not make out either a submission at common law or under the statute, or a reference to, and trial by, referees. The proceeding was just what the order of the board declared it to be. It was the appointment of a committee to examine the books of the treasurer and report whether there were any moneys due the appellant. The committee had no power to hear proof and determine the rights of the parties. The report of the committee was not binding, either upon the claimant or the county. The committee do not find that the appellant had any legal claim against the county, but they say that the claim was "equitable and just." If the order of the board appointing the committee did constitute a reference under the code, the action of the committee was in direct conflict with section 350, *supra*. The trial by referees is conducted in the same manner as a trial by the court. They may be required to state the facts and conclusions of law separately; otherwise they render a general finding. Their decision must be given, excepted to, and reviewed, like the decision of the court. The report of the referees upon the whole issue stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the reference is to report the facts, the report has the effect of a special verdict. There was no exception taken to the report; there was no judgment rendered on the finding, or on the special verdict. The report of referees stands as a general finding by a court, or as the special verdict of a jury, and the finding in the one case, and the verdict in the other, must be followed by a judgment thereon, or they will amount to nothing. No action can be maintained either upon a finding by the court or the verdict of a jury. The party that has obtained the finding of a court or the verdict of a jury in his favor has no remedy but to move the court

for a judgment thereon; and if he fails to do so, he has, by his neglect, abandoned his rights, and has no right to complain. It is quite obvious that no valid cause of action was shown by the facts stated in the second paragraph of the complaint, and that the court committed no error in sustaining the demurrer.

It is equally plain that there was no cause of action stated in the third paragraph of the complaint. That paragraph alleged that there was a settlement, a balance struck, and a promise to pay such balance. The appellant referred to, and incorporated into that paragraph, the claim of the appellant, the order of the board appointing a committee, the report of the committee, and the order of the board rejecting the claim. In placing a construction upon the pleading, we have to examine the exhibits, as well as the allegations of the pleader. The exhibits contradict the allegations of the complaint, and conclusively show that there was no settlement, and no promise to pay. The board of commissioners can only speak by their record. The record shows that instead of there having been an accounting, there was a reference, to obtain information, and when such information was received, the claim was rejected. The court did right in sustaining the demurrer to the third paragraph.

The judgment is affirmed, with costs.

W. A. McKenzie, *D. C. Donnohue*, *D. E. Williamson*, and *A. Daggy*, for appellant.

M. A. Moore and *S. Turman*, for appellee.

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171 48

PORTER and Another *v.* WILSON and Another.

DEMURRER.—A demurrer assigning for cause, that the several paragraphs of a complaint "are not good and sufficient in law," presents no issue of law.

SAME.—*For what Causes Allowed.*—A demurrer must assign some one of the six causes enumerated by the code. (2 G. & H. 77.)

PRACTICE.—*Motion to Strike Out.*—A paragraph of an answer which is equivalent to the general denial should be stricken out on motion, in a case where the general denial is pleaded elsewhere in the same answer.

FRAUD—*False Representation in Sale of Real Estate.*—A complaint alleged that defendant as agent of A. sold plaintiff certain real estate, on one acre of which stood a school house; that at the time of the sale, the defendant fraudulently and falsely represented that the school house and the land on which it stood had been abandoned and vacated by the school trustees, and that the trustees had erected another school house in the district, which was used for school purposes; that these representations were known by the defendant to be false; that the plaintiff relied upon them; and that they were false. The defendant answered, that the plaintiff was on the land at the time of the purchase; that he fully examined the same, and was fully apprised of the condition of the land and the said school house, and knew that the principal held the land, including the school house, by a general warranty deed duly recorded.

Held, that the answer was bad.

PRACTICE.—*Bill of Exceptions.*—On the 8th of June, a cause was disposed of, and sixty days were given to file a bill of exceptions, and on the 27th of November following, a bill of exceptions was signed by the judge. To the bill a certificate was appended by the judge, stating that it was presented and left on his desk in his necessary absence from home; and that he did not return until after the time for signing the same had expired.

Held, that as it did not appear that the bill was presented within the time limited, it could not be regarded as part of the record.

APPEAL from the Howard Circuit Court.

WORDEN, J.—Action by the appellees against the appellants. Complaint in three paragraphs. Demurrer to the complaint in the following words: "Now come the defendants and demur to the first, second, and third paragraphs of the plaintiffs' complaint, for the following grounds of objection, to wit: first, said first, second, and third paragraphs, nor either of them, is good in law; second, there is a misjoinder of causes of action; third, there is a misjoinder of parties defendants; wherefore," &c. The demurrer was overruled, and the defendants excepted.

The defendants then answered, first, by general denial of the first and second paragraphs of the complaint; second, by setting up matter professedly in avoidance of the first paragraph of the complaint; third, by setting up matter in avoidance of the second paragraph of the complaint.

The court, on motion, struck out the second paragraph of the answer, as being nothing more than the general denial, which was already pleaded, and sustained a demurrer to the third, on the ground that it did not state facts sufficient, &c.

The cause was tried by the court, who found for the plaintiffs and rendered judgment accordingly, having overruled a motion of defendants for a new trial.

The appellants have assigned error upon the rulings of the court in overruling the demurrer to the complaint; in striking out the second paragraph of the answer; and in sustaining the demurrer to the third paragraph.

Beginning first with the last assigned cause of demurrer to the complaint, we may observe that we perceive no misjoinder of parties defendants; but if there were, we can hardly conceive that the defendants could succeed on a joint demurrer therefor.

If the second cause of demurrer, the misjoinder of causes of action, was well taken, and if for that cause the demurrer should have been sustained, the judgment below cannot, for that reason, be reversed. 2 G. & H. 81, sec. 52.

The first cause of demurrer, that the several paragraphs are not "good and sufficient in law," raises no question for our consideration. It is not equivalent to a statement that the pleading does not state facts sufficient to constitute a cause of action, nor is it any one of the statutory causes of demurrer. The statute enumerates and defines six causes of demurrer, and provides that for no other cause shall a demurrer be sustained. 2 G. & H. 77; *Lane* v. *The State*, 7 Ind. 426; *Tenbrook* v. *Brown*, 17 Ind. 410; *Kemp* v. *Mitchell*, 29 Ind. 163.

Passing from the complaint to the answer, we are of opinion that the court rightfully struck out the second paragraph thereof for the reason assigned, as the matter of the paragraph was covered by the general denial.

We are also of opinion that the demurrer was correctly sustained to the third paragraph of the answer. The paragraph of the complaint to which it was pleaded charges that

the defendants were real estate brokers and partners in the business of buying and selling real estate; that they, as the agents of George W. Silvers, sold to the plaintiffs certain real estate described, one acre of which, on which stood a school house, belonged to the township; that the defendants, for the purpose of inducing the plaintiffs to make the purchase, and intending to deceive and defraud them, falsely and fraudulently represented to them that the school house and the land on which it stood had been abandoned and vacated by the school trustees; that there had been no school in the house for years; that the trustees had erected another school house in the district, a quarter or a half mile north of the premises which they then occupied for school purposes; that these representations were known to be false by the defendants; that the school house had not been abandoned, but had been used continuously for school purposes by the township down to the time of sale; that no other school house had been built in the district; that the plaintiffs, being strangers in the country and ignorant in the premises, and relying upon the representations, made the purchase, &c.

The gist of the paragraph is the fraud perpetrated by the representations that the school house and the land on which it stood had been abandoned and vacated by the school trustees; that there had been no school in the house for years; and that another school house had been erected in the district.

The answer to this is, in substance, that at the time of the purchase by the plaintiffs, they were on the land and fully examined the same, and were well apprised of the condition of the land and said school house, and knew that Silvers held the land, including the school house, by a general warranty deed duly recorded. All that is thus alleged might be true, and yet the plaintiffs not know that the representations imputed to the defendants were false. The allegation that the plaintiffs were apprised of the condition of the land and school house is ambiguous, and must be construed most strongly against the defendants; it cannot there-

fore be held to mean anything more than that the plaintiffs were apprised of the material condition of the land and school house. The allegation that the plaintiffs knew that Silvers held the land by warranty deed, does not help the matter any. That can mean nothing more, as applied to the case made by the complaint, than that the plaintiffs knew that Silvers held a warranty deed for the land. The answer does not controvert the title of the township to the acre, nor is there anything in it that meets or avoids the effect of the false and fraudulent representations imputed to the defendants.

The remaining errors assigned relate to such matters as can be made to appear only by bill of exceptions.

The cause seems to have been disposed of on the 8th of June, 1869, and sixty days were given in which to file a bill of exceptions. A bill of exceptions was signed by the judge on the 27th of November, and filed on the 21st of December of the same year. The judge appends to the bill of exceptions a certificate that it was presented and left on his desk in his necessary absence from home, and that he did not return until after the date of signing the same had expired. It will be seen that the bill was not signed until between three and four months after the time limited, and then it was not filed for nearly a month after it was signed. The certificate of the judge does not show, nor does it in any manner appear, that the bill was presented and left on the judge's desk within the time limited; and whatever we might think should be done in case it had been thus presented within the time, we are clearly of the opinion that the bill in question can not be regarded as part of the record.

The judgment below is affirmed, with costs, and five per cent. damages.

J. W. Robinson and *H. A. Brouse*, for appellants.

M. Bell and *A. S. Bell*, for appellees.

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JOHNSON v. TUTEWILER and Others.

MARRIED WOMAN.—*Liability on Contracts.*—Where work is done and materials furnished at a husband's request, for buildings erected on the real estate of his wife, the latter is not liable, although she may have subsequently signed a promissory note for such work and materials.

SAME.—*Power to Charge her Separate Property.*—A married woman may charge her separate property for the cost of such improvements as are necessary to a complete and full enjoyment thereof.

SAME.—*Husband.*—A husband has no power to charge, by his separate contract, the real estate of his wife.

SAME.—*Mechanic's Lien.*—The contract of a husband cannot create a mechanic's lien upon the real estate of his wife.

SAME.—*Pleading.*—To a complaint on a note given for work done and materials furnished in building a house on certain real estate, and to enforce a mechanic's lien for such work and materials, an answer by a defendant that at the time the work was done and materials furnished, and the note given, said defendant was a married woman and said real estate was her separate property, is good on demurrer.

SAME.—*Pleading.—Reply.*—To such an answer the plaintiff should reply that the work done and materials furnished were necessary to a full and complete enjoyment of the real estate.

APPEAL from the Marion Common Pleas.

WORDEN, J.—This was a complaint by the appellees against the appellant and Benjamin F. Johnson, her husband, upon a promissory note executed by the defendants, and to enforce a mechanic's lien. The complaint sets out a promissory note executed by the defendants to the plaintiffs for the sum of two hundred and twenty-six dollars, due at ninety days, and dated August 4th, 1867, and avers that it was given for work and materials furnished in building a house for the defendants on a lot described, in the city of Indianapolis, and that a lien was filed within sixty days from the completion of the building, in the recorder's office. A copy of the notice of the lien is also set out, which was filed July 1st, 1867, and shows that the work had been done and the materials furnished within sixty days next before that time. It may be observed that the complaint does not show that the relation of husband and wife existed between the defend-

ants, or that Mrs. Johnson was a married woman, or that the title to the lot was in her.

The defendants demurred to the complaint, but the demurrer was overruled and exception taken. Proceedings were had in the cause which indicate that the defendant Benjamin had availed himself of the benefit of the bankrupt law, and no judgment was taken against him.

The appellant Caroline answered separately by the general denial, and also, amongst other things, thirdly; that she then was, and for more than ten years last past had been, the wife of the said Benjamin; that the lot described was her own individual and separate property, held in her own right in fee, and that her said husband had no right, title, or interest in the same, or any part thereof; wherefore, &c.

A demurrer was sustained to the said third paragraph of Caroline's answer, and she excepted.

The cause was tried by the court, and the trial resulted in a finding for the plaintiffs against the appellant, that she was indebted to the plaintiffs in the sum of two hundred and fifty dollars, and that the plaintiffs hold a lien therefor on the lot in question. Over a motion for a new trial, made by the appellant, judgment was rendered against her for the amount of the finding, and that the lien be enforced, &c.

The evidence is in the record, and the assignments of error raise the material questions involved.

It is clear from the evidence that during the transaction, the appellant and Benjamin were husband and wife; that the lot in question was the sole property of Caroline, bought with her own separate money; that the work was done and the materials furnished at the request of Benjamin, without any contract with the said Caroline or direction from her to the plaintiffs, but that she subsequently signed the note in question with her husband.

On the facts thus shown, it is clear to our minds that the appellant is not liable, nor has any lien been acquired as against her property. The note, as to her, is obviously void.

The law has been, and perhaps still is, in a measure, unset-

tled in this State, as to the power of a married woman to encumber her real estate, or contract with reference thereto. The subject was learnedly discussed in the case of *Kantrowitz* v. *Prather*, 31 Ind. 92. See, also, *Lindley* v. *Cross*, *Id.* 106. The latter case was for the enforcement of a mechanic's lien, in which it was held that a married woman might charge her separate estate for the improvement of her property, where the improvement is necessary for a full and complete enjoyment thereof; but that as the power of a married woman to make new improvements is liable to abuse, it must be under the control of the court trying the case involving the liability of her separate property for debts created in making such improvements; and that a complaint to enforce a mechanic's lien in such case is bad, unless it state that the improvement is necessary and proper for a full and complete enjoyment of the property.

While we recognize the right of a married woman to charge her real estate with contracts for such improvements as are necessary and proper for its full and complete enjoyment, we do not recognize the right of the husband to thus charge it by his contract. He has no more authority to thus charge his wife's estate than if he were not her husband. He may, to be sure, unite with her in a conveyance or mortgage of her land, but otherwise he has no control over it, or power to encumber it. His contract for its improvement can give the mechanic no lien upon it. This is well settled by the case of *Spinning* v. *Blackburn*, 13 Ohio St. 131. See, also, *Johnson* v. *Parker*, 3 Dutcher, 239. In the Ohio case, the lien sought to be established was for lumber, and the wife had full knowledge that the lumber was furnished for, and used in, the erection of a house on her premises; and she planned and gave directions how and where the lumber should be used in the building. It was held, nevertheless, that as the contract for the lumber was not made with her, no lien was acquired as against her.

In the case under consideration, the appellant does not appear to have had anything to do with the work done, or

materials furnished, whatever. She afterwards signed the note with her husband, but that does not bind her, nor does it imply that the work had been done, or the materials furnished, under a contract with her, or at her request. It may be observed, also, that the lien must have been good at the time the notice was filed, or it never became good. The note was not executed until more than a month afterwards, and it could not relate back and cure the defect. The legal merits of the case, on the evidence, are with the appellant.

We go back briefly to the pleadings. The complaint, on its face, seems to be good; for it does not disclose the coverture of the appellant, or the fact that she was the separate owner of the property, and it alleges that the work was done, and the materials furnished, for the defendants. But the third paragraph of the answer averred the coverture of the appellant, and her ownership of the lot. The statement of these facts made the answer good to the complaint as it then stood, and made it necessary for the plaintiffs to aver, by way of replication or amendment to the complaint, that the improvement was necessary and proper for a full and complete enjoyment of the property. *Lindley* v. *Cross, supra.*

The demurrer to the third paragraph of the answer should have been overruled.

The judgment below is reversed, with costs, and the cause remanded.

J. T. Dye and *A. C. Harris*, for appellant.

E. F. Ritter, for appellees.

RICHARDSON *v.* REED and Another.

DEMURRER.—*Exception.*—Where a demurrer to a complaint is overruled, but no exception to the ruling is entered in the court below, and such ruling is not assigned in the Supreme Court as error, no question as to the sufficiency of the complaint can properly arise in the record.

EVIDENCE.—A judgment will not be reversed upon the weight of evidence, where there is a conflict and there is evidence which, if believed, will support the verdict.

EXCESSIVE DAMAGES.—A judgment will not be disturbed on the ground that the damages are excessive, if there is a conflict in the evidence, and there may be an honest difference of opinion as to the propriety of the finding, where the finding is within the range of the evidence, and where it does not appear that substantial injustice has been done.

APPEAL from the Clay Circuit Court.

BUSKIRK, J.—The appellees sued the appellant for an alleged fraud in the exchange of certain real estate.

The complaint was in two paragraphs. The first charged, in substance, that Mahala Reed, the wife of her co-plaintiff, Charles W. Reed, was the owner, in her own right, of certain lots in Brazil, in the county of Clay, and State of Indiana, and of forty acres of land adjoining thereto; that the appellant was the owner of certain lots in the town of York, in the county of Clark, and State of Illinois, and of forty acres of land adjoining thereto; that the said Mahala exchanged her said lots and land in Clay county, Indiana, to and with the appellant, for his lots and land in Clark county, Illinois; that at the time of such exchange, the plaintiffs were ignorant of the location, boundaries, and quality of the Illinois land, except as it was pointed out to them by the appellant; that the appellant pointed out to them, as the land that he proposed to exchange, a high and dry tract, which was of the value of thirty-five dollars per acre; that after the trade had been made, and the deeds had been executed, it was ascertained that the said appellant had conveyed to them forty acres of overflowed land, which was only worth two or three dollars per acre; that the appellant owned the land that he pointed out and described to the plaintiffs, but conveyed a different tract of land; that the plaintiffs accepted of the deed, under the belief that the land therein described and conveyed was the same and identical land that had been pointed out to them; that in making the said exchange, the plaintiffs placed implicit reliance upon the representations of the appellant, and acted upon them as true, they at the time

having no personal knowledge as to the boundaries and description of the land; and that they had formed a judgment as to the quality and value of the land pointed out to them, but had formed none as to the tract of land conveyed to them.

The second paragraph was the same as the first, except that it was charged that the representations of the appellant as to the boundaries, description, quality, and value of the land in Illinois, were falsely and fraudulently made.

A demurrer was filed to each paragraph of the complaint, and was overruled, but there was no exception taken, nor is such ruling assigned for error here; consequently no question as to the sufficiency of the complaint can properly arise in the record.

The defendant answered by a general denial. The cause was tried by a jury, resulting in a verdict in favor of the plaintiffs in the sum of one thousand and ninety dollars. A motion was made for a new trial, and while it was pending, the plaintiffs remitted one hundred and thirty dollars of the verdict. Thereupon the court overruled the motion for a new trial, and rendered judgment for the sum of nine hundred and sixty dollars, to which ruling an exception was taken, and this is assigned for error.

It is maintained, in argument, that the court erred in overruling the motion for a new trial, for the reasons, that the verdict was not sustained by sufficient evidence, and that the damages assessed were excessive.

The evidence is in the record, and we have examined it with care. The evidence offered by the plaintiffs was sufficient to justify and support the verdict, if the jury believed it to be true. The evidence offered by the defendant was in plain and direct conflict with that of the plaintiffs. It was the duty of the jury to reconcile, if possible, this conflict, so that all the evidence might stand and be considered together, but if the conflict was irreconcilable, then the jury was required to determine which witnesses they would believe, and which they would disbelieve. The jury was far more com-

petent to determine such a question than is this court. The jury had the opportunity of observing the appearance, manner, and conduct of the witnesses upon the witness stand, which was a great assistance to them in determining the weight that ought to have been given to their evidence. Under the long and well settled practice of this court, we cannot reverse a judgment upon the weight of evidence, where there is a conflict, and there is evidence which, if believed, would support the verdict. *Sherman* v. *Cameron*, 14 Ind. 418; *O'Herrin* v. *The State*, 14 Ind. 420; *Harris* v. *Rupel*, 14 Ind. 209; *Gibson* v. *The State*, 9 Ind. 264; *Robertson* v. *Caldwell*, 9 Ind. 514; *Roberts* v. *Nodwift*, 8 Ind. 339; *Cahill* v. *Vanlaningham*, 7 Ind. 540; *Millhollin* v. *Jones*, 7 Ind. 715; *Calkins* v. *Evans*, 5 Ind. 441; *Rogers* v. *Bishop*, 5 Blackf. 108; *Lambert* v. *Sandford*, 2 Blackf. 137; *Hoagland* v. *Moore*, 2 Blackf. 167; *Lurton v. Carson*, 2 Blackf. 464; *Nagle* v. *Hornberger*, 6 Ind. 69.

A reversal of this case is also asked for the reason that the damages are excessive. The appellant claims that the damages should not have been more than six hundred and forty-five dollars. If the jury believed, from the evidence, that the land which was pointed out and described by the appellant was represented to be, and was, worth thirty-five dollars per acre, and that thirty-one acres of the land conveyed was only worth five dollars per acre, and the balance was worth thirty-five dollars per acre, then the verdict, as reduced by the remittitur, was correct. There was a conflict in the evidence as to the value of the land pointed out, and that conveyed. The jury were the sole judges of the credit to be given the witnesses. The verdict is within the range of the evidence, and this court cannot interfere with the verdict. There may be an honest difference of opinion as to the propriety of the verdict, and it does not appear that substantial injustice has been done. *Lurton* v. *Carson*, 2 Blackf. 464; *Wolcott* v. *Yeager*, 11 Ind. 84; *Ehrman* v. *Kramer*, 30 Ind. 26; *The Indianapolis, Cincinnati, and Lafayette R. R. Co.* v. *Trisler*, 30 Ind. 243.

The judgment is affirmed, with costs.

W. W. Carter, *S. D. Coffey*, and *A.T. Rose*, for appellant.

D. E. Williamson, *A. Daggy*, *G. W. Wiltse*, and *B. Wiltse*, for appellees.

MOORE and Another *v.* JACKSON and Another.

ATTACHMENT.—*Undertaking.*—When an undertaking, made by a defendant whose property has been attached, to enable him to retain the possession of the property, is sued upon, and a copy of it is set out and made a part of the complaint, and it is defective by reason of not being made payable to the plaintiff in the attachment proceeding, the defect is cured by section 790 of the code, 2 G. & H. 333.

SAME.—*Parties.*—In a suit upon such undertaking, all the creditors who have been adjudged entitled to participate in the distribution of the proceeds of the attached property should be made parties plaintiffs; or if any refuse to join, the fact should be stated in the complaint, and they should be made defendants.

APPEAL from the Hamilton Circuit Court.

WORDEN, J.—Jackson and Stanford commenced an action in the Court of Common Pleas of Hamilton county against Henry M. Moore and another, and caused a writ of attachment to issue therein, by virtue of which certain personal property of said Henry M. Moore was attached by the sheriff, and a delivery bond was executed therefor by the appellants, in the following words, viz.:

"We undertake that the following property, to wit: one bay stallion, valued at one hundred dollars, one sewing machine, twenty-five dollars, two bedsteads and bedding, fifteen dollars, attached as the property of Henry M. Moore and Katharine R. Moore by virtue of an attachment issued in the above entitled cause, by George Bragg, sheriff of Hamilton county, State of Indiana, shall be delivered up to said sheriff at the residence of Henry Moore, in Adams township, in Hamilton county, Indiana, on the first Monday of January,

1867, or at any time previous to said date, upon demand being made for said property, or to pay the cash value thereof.

HENRY M. MOORE,
A. J. MOORE."

After the institution of the original action, several other creditors filed their complaints, and in the language of the 186th section of the code (2 G. & H. 147), became parties to the action. Final judgments were rendered in favor of the several plaintiffs, and the attached property ordered to be sold, and the proceeds applied to the payment of said creditors, in proportion to the amount of their respective claims.

A part of the property attached not being forthcoming, this suit was brought by the appellees upon the delivery bond. A demurrer, assigning for cause, that the complaint did not state facts sufficient to constitute a cause of action, and that there was a defect of parties plaintiffs in the non-joinder of the other creditors who filed complaints and became parties to the original suit and had judgment, was filed by the defendants, which was overruled, and exception taken. Final judgment was rendered for the plaintiffs. The ruling on the demurrer is the only error assigned.

Objection is made that the complaint does not aver a demand of the property; but a demand of the property in accordance with the terms of the undertaking and a failure and refusal to deliver the same or pay the value thereof are specifically alleged.

It is also objected that the law does not authorize the kind of undertaking taken. The objection is, that the law requires these undertakings to be made payable to the plaintiff in the attachment proceedings (2 G. & H. 143, sec. 168), while this undertaking is not, in terms, made payable to any one in particular. This defect, if it be regarded as such, is abundantly cured by the provision of section 790 of the code. 2 G. & H. 333. And as the undertaking is set out and made a part of the complaint, the defect is thereby sufficiently suggested. *Cook* v. *The State*, 13 Ind. 154.

We come to the other ground of demurrer, viz.: the non-

joinder of the proper parties as plaintiffs, and are of opinion that for this cause the demurrer was well taken and should have been sustained.

The money arising from the sale of attached property, after paying costs and expenses, is to be paid to the several creditors, in proportion to the amount of their several claims as adjusted, and the surplus, if any, is to be paid to the defendant. 2 G. & H. 150, sec. 192.

Therefore, if the undertaking for the delivery of the property is forfeited, and the property attached is not forthcoming for sale in order to meet their demands, the several creditors must have an interest in the undertaking proportioned to their respective claims as adjusted, after paying costs and expenses.

We suppose that Jackson and Stanford were all the persons who were plaintiffs in the attachment proceedings at the time of the execution of the undertaking, but we think it enured to the benefit as well of all persons who afterwards came in and made themselves parties to the attachment proceedings, and procured the adjustment of their claims and the proper order for the distribution of the proceeds of the property attached. It would manifestly be a perversion of the object and purpose of the statute on the subject of attachments, to permit a part of the creditors, whose claims have been adjusted in the same proceeding, to exhaust the undertaking to the exclusion of the other creditors.

As all the creditors whose claims had been adjusted and who were entitled to distribution should have been made plaintiffs, or if any refused to join, the fact stated in the complaint and they made defendants (2 G. & H. 47), the demurrer should have been sustained.

The judgment below is reversed, with costs, and the cause remanded.

D. Moss, for appellants.

J. Stafford, for appellees.

BOYD and Another v. CRARY.

PRACTICE.—*Release of Errors.*—A judgment in favor of A. against B. was rendered by confession, upon a warrant of attorney made by B., waiving the filing of a complaint and the issue and service of process, and setting out a copy of the note on which the judgment was confessed, and authorizing the attorney confessing to release all errors. The record shows that the execution of the power was proved to the satisfaction of the court, and also that the defendant waived all error. B. appealed, assigning for error the rendering of the judgment without a complaint being filed, and without proof of execution of the power, and that a judgment was rendered for the amount of attorney's fees mentioned in the note. A. answered to the assignment of errors, that the judgment was rendered by virtue of a power of attorney made by B.; that in the power B. expressly waived the filing of a complaint, and released all errors; that the execution of the power was duly proved to the satisfaction of the court; and that judgment was rendered waiving all error, and was only for the amount of principal and interest due upon the note, and contained no amount for attorney's fees.

Held, that the release of errors pleaded, the truth of which was sustained by the record, was a bar to the proceeding in error.

APPEAL from the Tippecanoe Common Pleas.

DOWNEY, C. J.—This was an action by the appellee against the appellants. The defendants appeared by counsel, appointed by warrant of attorney, and confessed judgment. The warrant of attorney, the execution of which, the record says, was duly proved to the satisfaction of the court, waived the filing of a complaint, and the issue and service of process, set out a copy of the note on which the judgment was confessed, and authorized the attorneys appointed thereby to release all errors. No complaint was filed, but the original note was filed, in addition to being set out in the warrant of attorney. After the rendition of judgment, the record informs us that "the defendants waive all errors in this behalf." Affidavit was filed as required by statute.

Three errors are assigned in this court: first, that the court erred in rendering judgment without any complaint being filed; second, that the court erred in rendering judgment without proof of the execution of the warrant of attorney; third, the court erred in rendering judgment for the

appellee for the amount of the attorney's fee mentioned in the note.

The appellee moved to strike out the assignment of errors, because it is frivolous and sham, and in direct contradiction of the record. This motion having been overruled, the appellee pleaded, by way of answer to the assignment of errors, that the judgment wherefrom the appellants appeal was rendered in the court below upon, and by virtue of, a power of attorney duly executed by said appellants, pursuant to statute, as appears upon reference to the record in this cause, and that by and in said power, said appellants expressly waived the filing of a complaint, and released all errors in the judgment, and the judgment was accordingly rendered, waiving all errors, the execution of the power being first duly proved to the satisfaction of the court below; that for his complaint in the court below, the appellee filed the original note made by the appellants, and described in said power of attorney; and that, by the terms of said note, the appellee was entitled to have added, as damages, to the principal and interest due on said note, reasonable attorney's fees; but that, in truth and in fact, the judgment was taken simply for said principal and interest due on said note, and no attorney's fees were included in said judgment. Wherefore the appellee saith that said appellants are estopped from taking this appeal, or complaing of the alleged errors specified in their assignment.

To this answer there was a demurrer by the appellants, on the ground that it did not state facts sufficient, &c., which was overruled, and the appellants replied by general denial.

We are of the opinion that the release of errors pleaded, the truth of which is sustained by the record, is a bar to the proceeding on error in this court. See *Miller* v. *Macklot*, 13 Ind. 217; *Agard* v. *Hawks*, 24 Ind. 276.

The judgment is affirmed, with five per cent. damages and costs.

J. R. Coffroth and *T. B. Ward*, for appellants.

J. A. Stein, for appellee.

Ott v. The State.

Recognizance.—*Form of.*—In a criminal proceeding on appeal from a justice of the peace, a bond conditioned that the defendant "shall prosecute his appeal to final judgment, and pay such judgment as may be rendered against him on such appeal," is a good recognizance, although imprisonment may be a part of the punishment provided.

APPEAL from the Marion Criminal Circuit Court.

Pettit, J.—This suit was commenced before a justice of the peace, and was a prosecution for malicious trespass under section 13, 2 G. & H. 462, which reads thus: "Every person who shall maliciously or mischievously injure, or cause to be injured, any property of another, or any public property, shall be deemed guilty of a malicious trespass, and be fined not exceeding two fold the value of the damage done, to which may be added imprisonment, not exceeding twelve months." Ott was found guilty and fined, and appealed to said criminal court, and gave the following bond or recognizance for his appearance and prosecution of the suit in that court:

"We, John Ott and J. George Stilz, acknowledge ourselves bound to the State of Indiana, in the sum of twenty-five dollars. Witness our hands and seals, this 19th day of January, 1871. Whereas the State of Indiana, within thirty days last past, obtained judgment against John Ott, before H. H. Boggess, Justice, for ten dollars, with costs taxed at four dollars and five cents, and John Ott has appealed therefrom; now, if said John Ott shall prosecute his appeal to final judgment, and pay such judgment as may be rendered against him on such appeal, this bond shall be null and void, else in full force." The bond was signed and sealed by the obligors, and duly approved by the justice. The prosecuting attorney filed in said court the following motion: "The State of Indiana moves the court to dismiss the appeal of the defendant herein, because, first, the defendant has not, within thirty days after the rendition of the judgment herein, en-

tered into a recognizance as by law required upon appeal, and has not filed a bond in legal form; second, there is no record in said cause authorizing the appeal herein." The bond was filed in time, and there can be no objection to the record or transcript from the justice, except the informality of the bond or recognizance.

While the motion to dismiss the appeal was pending, the defendant made and filed the following affidavit:

"The State of Indiana, Marion county, *ss.* In the Marion Criminal Circuit Court, Term of January, A. D. 1871. The State of Indiana *v.* John Ott, Malicious Trespass.

"John Ott, the defendant in the above entitled cause, comes into open court, and, being duly sworn, on his oath says he is now here present, ready and willing to answer the said charge and complaint against him, and to submit to any judgment that may be rendered against him in said cause, upon the trial thereof; that at the time of the trial and judgment against him, the court below required him to file his appeal bond in manner and form as the same was filed and appears in the transcript of the proceedings before the said justice of the peace; and he complied with the order and requirements of said justice in that behalf, and was then and there willing and ready to have entered into a recognizance, if the same had been required of him, to appear in this court to answer said charge and complaint; but no such recognizance was then and there exacted of him. He further says that he is not guilty, as he verily believes, of the offense charged against him, and is now willing and ready to meet said charge, and submit to and suffer any judgment that he may be required to suffer or submit to, upon the trial and hearing of this cause upon the merits.

"And he further says that if said appeal was not properly taken or perfected, and if a recognizance was not exacted or taken of him in said cause, it was due and owing to the mistake and misapprehension of his duty, of said justice of the peace, and not to any failure of duty, or unwillingness to comply therewith, on the part of this defendant, and he is

now here willing to enter into recognizance, or surrender himself to the sheriff of this court to answer said charge."

Over the objection of the appellant, the court sustained the motion, and dismissed the appeal, and this ruling was excepted to, and an appeal to this court was taken; and the sufficiency of the bond as a recognizance is the only question before us. It is true, that it is not in the precise form prescribed by statute in such case, 2 G. & H. 638; but, in view of two other provisions of the code, 2 G. & H., p. 333, sec. 790, and p. 399, sec. 49, which provide that no defect, informality, or omission, shall defeat such instruments, but that the parties shall be bound by them to the full extent that they would if the recognizance was formal and perfect, we hold that the bond was sufficient, and that the court erred in dismissing the appeal. As imprisonment might form part of the punishment had the accused been convicted, the trial could not have taken place without his presence. 2 G. & H. 412, sec. 94. In *Stipes* v. *The State*, 8 Ind. 280, this question was before the court, and it seems to have been taken for granted that if a bond had been on file, the appeal should not have been dismissed, and we feel confident, had this bond been forfeited by the non-appearance of the defendant below, and had suit been brought on it with proper averments, we should have held the bond good as a recognizance.

The judgment of the said criminal court is reversed, and the cause remanded for further proceedings.

J. W. Gordon, *T. M. Browne*, and *R. N. Lamb*, for appellant.

B. W. Hanna, Attorney General, for the State.

THE STATE v. ELDER and Another.

FUGITIVE FROM JUSTICE.—*Bail.*—Fugitives from justice returned to the county wherein the offense was committed, under the Act of May 27, 1852, may be let to bail until an examination be had.

SAME.—*Recognizance*—In such case, if the fugitive returned be taken before a judge in open court, such judge may recognize such fugitive to appear at the time fixed for an examination; and such recognizance may be entered on the order book, under section 37 of the criminal code, and is not invalid because not signed by the recognizors.

APPEAL from the Decatur Circuit Court.

DOWNEY, C. J.—Action on a forfeited recognizance. The complaint sets out the facts, in substance as follows: Frank Elder was arrested in Ripley county, on a warrant issued by a justice of the peace of that county, on an affidavit charging him with the commission of the crime of larceny, in Decatur county, and alleging that he had fled from that county. Upon the hearing of the cause, the justice of the peace adjudged him guilty, and that he should be conveyed to Decatur county, and delivered to some judge of a circuit court, or court of common pleas, or justice of the peace; and he was accordingly conveyed to Decatur county, and the circuit court of that county being in session, the Hon. Jeremiah M. Wilson presiding, he was, with the warrant, affidavit, and transcript of the proceedings, delivered to the judge in open court. The hearing of the case was fixed for the next day, July 17th, 1869, and the accused was ordered to enter into a recognizance in the sum of one thousand dollars, or be committed to the custody of the sheriff of the county. Thereupon, the accused, with Elijah S. Elder as his bail, entered into the recognizance on which this suit is founded, which was entered on the order book of the court, but not signed by the recognizors. On the next day, there was a forfeiture of the recognizance by failure of the accused to appear, and judgment of forfeiture was entered.

Separate demurrers were filed by the defendants to the complaint, and sustained by the court. Exception was duly taken, and the question for our decision is as to the correctness of this ruling.

The statute relating to fugitives from justice fleeing from one county to another is as follows:

"Be it enacted by the General Assembly of the State of Indiana, that if any person, having committed a crime in one county, shall flee to another, any judge of the Supreme Court, or circuit court, or court of common pleas, or any justice of the peace within the county wherein said fugitive may be, shall, on the oath of any person charging such fugitive with such crime (either directly, or on the belief of the affiant) issue his warrant and cause such fugitive to be arrested and brought before him; and after evidence heard, if in the opinion of such judge, or justice, the proof or presumption is strong as to the guilt of the person charged, such judge or justice shall issue his warrant to some constable, to convey such fugitive to the county in which he committed the offense charged against him, and deliver him to some judge of the circuit court, or court of common pleas, or justice in such county, together with the warrant of the judge or justice before whom the said fugitive was examined; and it shall be the duty of such judge or justice to whom such fugitive shall be delivered to cause him to be committed to the custody of some constable or sheriff of the county for safe keeping; and to summon forthwith the person against whose person or property the said offense shall have been committed, or some witness thereto; and such judge or justice shall on the examination be governed in all respects as though said complaint had been made and affidavit taken before him in the first instance; and the constable who shall convey such fugitive from the county where he was first arrested to the county in which the offense was committed shall receive the same fees for such service as are by law.

allowed to sheriffs for like services, and subject to the same rules and conditions." 2 G. & H. 434.

It is insisted by counsel for the appellees that when the accused was delivered to the judge, it was his duty to cause him to be committed to the custody of some constable or the sheriff of the county for safe keeping until the time of hearing, and that he had no power to let him to bail and take a recognizance for his appearance at the time fixed for the examination.

If the statute above quoted was the only law on this subject, this position might be tenable. But as there are other provisions with reference to the power to take recognizances, they must be examined and must have their operation and effect in determining the question. Section 15, 2 G. & H. 8, is as follows: "The judges of such circuit courts, within their respective districts, shall take all necessary recognizances to keep the peace, or to answer any criminal charge, or offense in the court having jurisdiction."

Section 37, 2 G. & H. 397, is as follows: "Recognizances in criminal proceedings may be taken in open court, and entered on the order book."

This was a bailable offense, and the enactments on this subject ought to be so construed as to give the accused the right to give bail, if such construction can be properly put upon them. We are of the opinion that the judge had the right to let the accused to bail, and take a recoginance for his appearance at the time set for the preliminary examination.

A more difficult question is whether the recognizance can be regarded as having been taken in open court, and therefore properly entered of record, as authorized by sec. 37, 2 G. & H. 397, and valid without being signed by the recognizors.

With some hesitation, we have come to the conclusion that the recognizance may be regarded as taken in open court, and therefore properly entered of record, and valid. See 2

Cooley's Bl. Com. 341; *Andress* v. *The State*, 3 Blackf. 108; *Campbell* v. *The State*, 18 Ind. 375.

The judgment is reversed, with costs, and the cause remanded.

C. Ewing, *J. K. Ewing*, and *D. E. Williamson*, Attorney General, for the State.

J. S. Scobey, *J. Gavin*, and *J. D. Miller*, for appellees.

HIGGINS *v.* WILLIS.

MARRIED WOMAN.—*Pleading.*—In a suit upon a promissory note, commenced before a justice of the peace, the coverture of the defendant, the maker, at the time of the execution of the note, is a bar to the action, and may be given in evidence without being pleaded specially.

APPEAL from the Pike Common Pleas.

WORDEN, J.—Action by the appellee against the appellant upon a promissory note executed by the latter to the former. The suit was brought and tried before a justice of the peace, and appealed to the court of common pleas, where there was a trial by the court, finding, and judgment for the plaintiff, a motion for a new trial having been overruled.

One of the reasons assigned for a new trial was, that the finding was not sustained by the evidence. The motion should have been sustained. The evidence, which is uncontradicted, clearly and unequivocally shows that the appellant, at the time the note was executed, was a married woman.

This is a valid defense to the note. But it is claimed by the appellee that coverture is a mere matter of abatement, and not admissible under the issues in the cause. Doubtless, if a married woman is sued alone, when her husband ought to be joined, his non-joinder is mere matter of abatement. But

the ground of defense here is not the non-joinder of the appellant's husband, but the fact that she was covert at the time she executed the note. This is clearly matter in bar of the action. It does not give the plaintiff any better writ, but defeats the action in any form in which it might be brought. The appellant's coverture being a bar to the action, it follows that it can be given in evidence without specially pleading it, in suits originating before justices of the peace, as provided for in section 34, 2 G. & H. 585.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

J. W. Burton, *E. F. Littlepage*, and *M. Chambers*, for appellant.

J. C. Denny, *G. G. Reiley*, and *J. H. Miller*, for appellee.

HULL *v.* CONOVER'S Executors.

PLEADING.—*Cause of Action.*—A. sued B. before a justice of the peace upon a promissory note made by B., payable to the order of C. There was no indorsement of the note by C. to A.

Held, that the filing of the note as the only cause of action was insufficient, and that the case was not one of a mere defect of parties.

APPEAL from the Fountain Circuit Court.

DOWNEY, C. J.—This suit was commenced by William Conover against the appellant, before a justice of the peace, where there was judgment for the defendant. The plaintiff appealed to the circuit court, where the death of William Conover was suggested, and his executors made parties plaintiffs in his stead. There was judgment in the circuit court for the plaintiffs, from which the defendant appealed to this court.

The first point presented to us is, that the cause of action is insufficient. It consists of the following note:

"$150.00 COVINGTON, June 15th, 1868.

"Eighteen months after date, I promise to pay to the order of Hiram Abdill one hundred and fifty dollars; value received, without any relief from valuation or appraisement laws. Interest from date, six per cent.

DANIEL HULL."

There is no indorsement of the note by Abdill to William Conover, or to the appellees, and there is, therefore, nothing to show any right in him or them to maintain the action. See *Bell* v. *Trotter*, 4 Blackf. 12; *Vandagrift* v. *Tate*, *id.* 174; *Hamilton* v. *Ewing*, 6 Blackf. 88; McDonald's Treat. 68, 69. This is not a mere defect of parties.

The judgment is reversed, with costs, and the cause remanded.*

T. F. Davidson, for appellant.

H. H. Stillwell, *S. F. Wood*, *J. E. McDonald*, *J. M. Butler*, and *E. M. McDonald*, for appellees.

*Petition for a rehearing overruled.

CUNNINGHAM *v.* THE STATE, on the Relation of WILSON.

BASTARDY.—*Verdict.*—The verdict of a jury in a bastardy proceeding is sufficient, if it finds that the relator was delivered of a bastard child, and that the defendant is the father.

SAME.—*Jurisdiction.*—*Practice.*—A justice of the peace possesses a discretionary power to recognize a defendant in a bastardy proceeding to either the circuit court or court of common pleas, and the exercise by the justice of such discretion, and the filing of the transcript and original papers in the clerk's office, confer upon, and complete the jurisdiction in whichever of said courts to which the defendant may be recognized; and where a defendant is recognized to appear in the common pleas court, and the clerk, by mistake, dockets the cause in the circuit court, this will not confer upon the latter court any jurisdiction, and the proper motion is to strike the cause from the docket of the circuit court.

SAME.—*Court of Common Pleas.*—*Jurisdiction.*—The act of March 4th, 1853,

(2 G. & H. 626) confers upon the court of common pleas concurrent jurisdiction with the circuit court in all complaints for bastardy.

APPEAL from the Clinton Common Pleas.

BUSKIRK, J.—This was a proceeding in bastardy, commenced on the 21st day of June, 1869, before a justice of the peace of Clinton county, against the appellant, who was arrested and appeared before the justice. The justice, upon the preliminary examination, found that the appellant was the father of the bastard child named in the complaint, and recognized him to appear at the next term of the Clinton Common Pleas Court, to answer such charge.

The justice, on the first day of July, 1869, filed the transcript and papers in the clerk's office of said county. The clerk marked the same as filed in the circuit court, and entered the same upon the docket of the October term, 1869, of said circuit court; at which term the appellant appeared and moved the court to dismiss this cause for the want of jurisdiction. The court refused to dismiss the cause, but ordered the same to be transferred to the common pleas court of said county, to which court the appellant had been recognized; and that the clerk should mark the same filed in said court, and enter the same upon the docket of said court, to which the appellant excepted, and presents such exception by a bill of exceptions, signed by the circuit judge. At the October term, 1869, of the Clinton Common Pleas Court, this cause was upon the docket of said court. The appellant entered a special appearance, and moved the court to dismiss the cause—for what reason the record does not show—which motion was overruled, and an exception was taken. The cause being at issue, was submitted to a jury for trial, resulting in the following verdict:

"We, the jury, find that Ida A. Wilson was delivered of a bastard child, and that the defendant is the father.

JAMES J. MILLER, Foreman."

The appellant then moved the court in arrest of judgment. The motion was overruled, and an exception was taken. The court thereupon rendered judgment upon the

verdict. The objection urged to the verdict is, that it does not state that the bastard child is the one mentioned in the complaint. We think the verdict is sufficient. This court has decided that the verdict of a jury which found that the defendant was guilty of grand larceny, without saying "as charged in the indictment," was sufficient. *Moon* v. *The State*, 3 Ind. 438; *Evans* v. *The State*, 7 Ind. 271. The appellant has assigned the following errors:

1. The circuit court erred in overruling the motion of defendant to dismiss the cause, and ordering the same to be placed on the files of the common pleas court.

2. The common pleas court erred in overruling the motion of defendant to dismiss the cause.

3. The court of common pleas erred in overruling the motion in arrest of judgment.

4. The common pleas court erred in rendering a judgment against defendant which was not warranted by the record.

There is nothing in the first assignment of error. The cause never was properly in the circuit court. That court acquired no jurisdiction over the subject-matter or the parties. The proper motion was not to dismiss, but to strike the same from the docket. Perhaps the circuit court did not possess the power to order the case to be transferred to the common pleas court; but this is an appeal from the common pleas court, and not from the circuit court, and we cannot review the ruling of the circuit court.

There is nothing in the second assignment of error. We infer from the argument of counsel that the motion made in the common pleas court to dismiss was based upon the fact that it had been transferred from the circuit court. The order of the circuit court did not confer any jurisdiction upon the common pleas court. The act of March 4th, 1853, conferred on the courts of common pleas concurrent jurisdiction with the circuit court in proceedings in bastardy. The proceeding must be commenced before a justice of the peace, who possesses the discretionary power to recognize a

defendant to either court, and the election of the justice confers jurisdiction on whichever court he may recognize the defendant to. When the transcript and original papers were filed in the clerk's office, the jurisdiction became complete. Surely it cannot be successfully maintained that the mistake of the clerk, in marking the papers filed and docketing the cause in the wrong court, could defeat the jurisdiction of the court of common pleas. While the order of the circuit court did not confer any jurisdiction upon the common pleas court, it could not defeat the jurisdiction. The law required the clerk to do just what the circuit court ordered him to do.

The motion in arrest of judgment presents for our decision the question of whether, by the laws of this State, the courts of common pleas have jurisdiction of proceedings in bastardy. It is maintained by the appellant that the circuit courts have exclusive jurisdiction. Section 4, 2 G. & H. 625, of "an act regulating prosecutions in cases of bastardy, and providing for the support of illegitimate children," required justices of the peace to recognize defendants to the circuit courts. Under that act the circuit courts possessed exclusive jurisdiction in such prosecutions. The act of March 4th, 1853, in express terms, confers upon courts of common pleas concurrent jurisdiction with the circuit courts in all complaints for bastardy and surety of the peace.

The courts of this State possess just such jurisdiction as may be conferred upon them by the legislature. We have examined, with care, the argument of the learned counsel for appellant, but we have been unable to discover any valid reason against the validity of the act of March 4th, 1853, conferring upon courts of common pleas concurrent jurisdiction with circuit courts in prosecutions for bastardy. The common pleas courts have assumed and exercised such jurisdiction since the passage of said act, and we know of no valid or constitutional reason why they should not continue to do so.

The fourth assignment of error was intended to raise a

question as to the validity of the verdict of the jury and the judgment of the court rendered thereon, but we do not think that any question is raised by that motion. There was no motion made to set aside or make more perfect the verdict; there was no motion for a new trial; there was no motion to correct or set aside the judgment. Such a question cannot be raised, for the first time, in this court.

The judgment is affirmed, with costs, and five per cent. damages.

J. N. Sims, for appellant.

BROWN and Others *v.* ELLIS.

PRACTICE.—*Motion for New Trial.—Excessive Damages.*—A question as to excessive damages can only be reached by a motion for a new trial.

SAME.—*Judgment.*—To present a question as to the kind of judgment rendered, there must have been an exception entered, or a motion made to set it aside, or to modify it, in the court below.

APPEAL from the Fountain Circuit Court.

WORDEN, J.—This was an action by the appellee against the appellants to foreclose a mortgage and recover judgment on a note secured thereby, executed in 1859. The complaint prayed for payment in gold. The defendants appeared and answered, but upon the calling of the cause for trial they withdrew their appearance, and the issues formed by the pleadings were tried by the court in their absence. Finding and judgment for the plaintiff, and that the amount found due be paid in gold coin.

The errors assigned embrace two points only. First, that the amount found due was excessive; and, second, that the judgment for payment in gold coin was erroneous.

We are of opinion that neither of the points made is properly raised by the record. The point as to excessive damages could only be reached by a motion for a new trial.

In regard to the other point, there should have been an exception to the kind of judgment rendered, or at least a motion to set aside or modify it, before bringing the case to this court. No step of this kind was taken in the court below.

The judgment of the court below is affirmed, with costs, and five per cent. damages.

M. M. Milford and *J. Poole*, for appellants.

J. Buchanan, for appellee.

TURPIN *v.* CLARK.

PRINCIPAL AND SURETY.—*Release of Surety by Extension of Time.*—The questions in this case are the same as those decided in Menifee *v.* Clark, *ante*, p. 304.

APPEAL from the Marion Common Pleas.

DOWNEY, C. J.—This was a suit by Clark against the appellant and another on a promissory note. The defendant Harrison G. Turpin answered, that by an agreement between the appellee and the other defendant, for whom he was security, the time for payment of the note had been extended without his consent, and that he was thereby discharged. There was a reply to the answer, to the second paragraph of which there was a demurrer, which was overruled, and an exception taken.

The question is the same as in the case of *Menifee* v. *Clark*, at this term, *ante*, p. 304, and must be decided in the same way.

The judgment is affirmed, with costs.

W. Wallace, for appellant.

C. W. Smith, Jr., for appellee.

THE STATE, on the Relation of DOUGHERTY, *v.* SAYER.

SURETY OF THE PEACE.—In a proceeding for surety of the peace, the question as to just cause of fear relates to the time of the institution of the proceeding, and not to the time of the trial.

SAME.—If, on the final trial of a proceeding for surety of the peace, it is found that the fears have, since the commencement of the proceeding, ceased to exist, this fact may be considered by the court in determining the time and amount of the recognizance to be entered into by the defendant, but it will not entitle him to an unconditional discharge, at the costs of the relator.

APPEAL from the Fulton Common Pleas.

WORDEN, J.—Ephraim Dougherty filed his affidavit for surety of the peace against the appellee before a justice, on which such proceedings were had as that the cause went to the court of common pleas, where it was tried by a jury, who returned the following verdict and answers to questions propounded to them, viz.:

1st. "Did the complaining witness have just cause to entertain his fears expressed in his affidavit (so far as the same relates to the defendant), at the time he made and filed his affidavit with the justice of the peace?" Answer. "Yes."

2d. "Has the complaining witness just cause to entertain his fears, expressed in his affidavit (so far as relates to the defendant), at this time?" Answer. "No."

"We, the jury, find that the complaining witness, Ephraim Dougherty, has not just cause to entertain his fears, expressed in his affidavit, at this time."

Upon this verdict the court discharged the defendant, and rendered judgment against Dougherty for the costs in the case. Dougherty excepted.

We are of opinion that the action of the court was erroneous. Under the statute regulating proceedings for surety of the peace (2 G. & H. 640), we think if a party applying for such surety has, at the time he makes and files his affidavit with the justice for that purpose, just cause to fear,

and does fear, that the defendant will commit such an injury as is mentioned in the statute, the case is made out, and judgment should be rendered against the defendant. In other words, the question as to just cause of fear relates to the time of the institution of the proceedings, and not to the time of the final trial. It would be a mockery of justice, where proceedings under this statute are justly and for good cause instituted, to turn the party instituting them out of court and mulct him in the costs on the final trial in the court of common pleas, because, at that time, there was no just cause of the fears which rightfully led to the institution of the proceedings.

If, on the final trial, it appears that, although there was just cause for entertaining the fears alleged and for the institution of the proceedings, yet that circumstances have intervened that render the fears groundless at the time of the final trial, this may well be considered by the court in determining the time and the amount of the recognizance to be entered into by the defendant for keeping the peace in future; but it does not entitle the defendant to be unconditionally discharged at the costs of the prosecuting witness.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to render judgment in accordance with this opinion.

D. Turpie and *D. P. Baldwin*, for appellant.

H. B. Jamison, for appellee.

THE INDIANAPOLIS, CINCINNATI, AND LAFAYETTE R. R. CO. *v.* ROBINSON.

RAILROAD.—*Killing Stock.—Pleading.*—To render a railroad company liable under the statute for killing stock, it must be alleged in the complaint, and proved, that the road was not securely fenced. It is not sufficient to say that the road "was not fenced according to law."

SAME.—*Pleading.*—To be good at common law, a complaint against a railroad company for negligently killing stock must allege that the injury did not result from the negligence of the plaintiff.

APPEAL from the Marion Circuit Court.

DOWNEY, C. J.—This action was brought by the appellee against the appellant before a justice of the peace, where there was judgment for the plaintiff, and an appeal to the circuit court. In the latter court, there was a trial by the court, finding for the plaintiff, motion by the defendant for a new trial overruled, and judgment on the finding.

Two questions are presented here: first, that the complaint is insufficient; and second, that the circuit court should have granted a new trial on account of the insufficiency of the evidence.

The complaint alleges, that on or about the 14th day of August, 1868, at the county of Marion, and State of Indiana, the defendant did kill two hogs of the plaintiff, of the value of thirty dollars, through the fault, misconduct, and negligence of the employees, servants, and agents of the defendant, by striking and running over the said hogs with a locomotive and train of cars running on the defendant's road, which road was not fenced according to law, &c.

It is urged against the complaint, that it is not a good one for negligence, because it does not allege that the plaintiff was without fault; and that it is not good under the statute requiring railroads to be fenced, because it does not allege that the road was not securely fenced, but only alleges that the road was "not fenced according to law," which it is contended is a mere conclusion of law.

To render the company liable, under the statute, it must be alleged and proved that the road was not securely fenced, &c. *The Indianapolis, &c., R. R. Co.* v. *Means*, 14 Ind. 30; *Indianapolis, &c., R. R. Co.* v. *Williams*, 15 Ind. 486; *The Indianapolis, &c., R. R. Co.* v. *Wharton*, 13 Ind. 509.

In *The Toledo, &c., R. R. Co.* v. *Fowler*, 22 Ind. 316, this court held, that, to allege that the road was not "fenced in by the defendant, in manner and form as in the statute pro-

vided," was sufficient. And in *The Indianapolis, &c., R. R. Co.* v. *Adkins*, 23 Ind 340, it was held by this court, that the allegation that the road "was not securely fenced as required by law," was sufficient. But in *The Indianapolis, &c., R. R. Co.* v. *Bishop*, 29 Ind. 202, the court seems to disapprove of the preceding cases, and that in 22 Ind. is expressly overruled. The learned judge who delivered the opinion says, the case in 23 Ind, was not in point, because the allegation was, that the road was "not securely fenced." But the allegation was, as we have seen, that the road was "not securely fenced as required by law." In the case in 29 Ind., the court held that the allegation, that the road was not fenced "as required by law," was only a conclusion of law, and not sufficient. It is, perhaps, more important to adhere to some one rule, than to try to determine which is exactly the best or most conformable to the authorities. Following the case in 29 Ind., *supra*, which is the last expressed opinion of this court, we must hold the complaint in the case at bar insufficient as a complaint under the statute.

Is it good as a complaint for an injury resulting from the negligence of the defendant, at common law, irrespective of the statute? It fails to allege, as will be seen, that the injury did not result from the negligence of the plaintiff. In our opinion, this defect renders the complaint bad as a complaint at common law. In *Wright* v. *The Indianapolis, &c., R. R. Co.*, 18 Ind. 168; *The Indianapolis, &c., R. R. Co.* v. *McClure*, 26 Ind. 370; *The Toledo, &c., R. R. Co.* v. *Bevin*, 26 Ind. 443, it is so held by this court in cases for killing cattle. Being governed, then, by these cases, we must hold that the complaint is fatally defective as a complaint at common law. It is contended by counsel for the appellee, that as the case originated before a justice of the peace, the complaint should not be tested by the same rules that are applied to complaints in the higher courts. But we cannot so decide. It requires no more skill in pleading to say that the injury resulted without any negligence on the part of the plaintiff, than it does to allege that it re-

sulted from the negligence and carelessness of the defendant. Both allegations are necessary to make the complaint substantially good.

As the case may again have to be tried upon the facts, we express no opinion upon them.

The judgment is reversed, with costs, and the cause remanded, with directions to the court to sustain the demurrer to the complaint, and if desired, grant leave to amend.

T. A. Hendricks, *O. B. Hord*, and *A. W. Hendricks*, for appellant.

I. Klingensmith, for appellee.

SKILLEN v. MCNEELY.

APPEAL from the Marion Common Pleas.

DOWNEY, C. J.—McNeely sued Skillen for a balance of the price of flour barrels sold and delivered. Skillen answered, first, by a general denial; and, secondly, set-off for the price and value of goods, wares, and merchandise sold to the plaintiff, and cash paid to the plaintiff and for his use. Reply by general denial to the second paragraph of the answer. Trial by the court; finding for the plaintiff; motion for a new trial overruled; and judgment.

The reasons assigned for a new trial are, first, the finding of the court is contrary to the evidence; second, the court erred in excluding testimony material to the defendant, on the plaintiff's objection.

The errors assigned are, that the court erred in refusing to admit in evidence a written memorandum of the number of staves made by one Hays, and in refusing a new trial.

The memorandum, having been made by a third person,

was not admissible as evidence against the plaintiff. It seems, however, as we understand the record, that this memorandum was in evidence as part of the deposition of Hays; and if so, there would seem to be no reason for again introducing it in evidence.

We have examined the evidence which is set out in the record, and are of the opinion that it is sufficient.

The judgment is affirmed, with costs, and five per cent. damages.

S. E. Perkins and *S. E. Perkins, Jr.*, for appellant.

J. S. Harvey, for appellee.

LEPPER *v.* NUTTMAN.

REPLEVIN BAIL.—*Fraud in Procurement of.*—Where one is induced to become replevin bail by the false and fraudulent representations of the judgment defendant, he is held bound thereby. *Contra*, if the representations were made by the judgment plaintiff, or by some one for him, with his consent or procurement.

SAME.—*Answer.*—Suit to revive and enforce a judgment against the widow and heirs of the judgment defendant, and his replevin bail. The replevin bail answered, that the deceased, in his lifetime, procured his consent to become replevin bail on another judgment; that he at the request of said judgment defendant went with him to the clerk's office, to execute the same; that he is a German, and cannot read English script; that the record was not read to him, but the deceased fraudulently represented that it was the judgment he had so consented to stay; and, relying on said representation, he executed the undertaking set forth; that at the time, he had no knowledge of the judgment sued on, and that if he had known it was a different judgment, he would not have become replevin bail thereon.

Held, that the answer was bad, because it did not connect the judgment plaintiff with the deceit.

APPEAL from the Allen Common Pleas.

DOWNEY, C. J.—John M. Nuttman recovered a judgment of foreclosure against Conrad Schmidt, on which the appel-

lant became replevin bail. Schmidt departed this life. John M. Nuttman assigned the judgment to the appellee, who instituted this action against the widow and heirs of Schmidt and the appellant, to revive and enforce the judgment.

The appellant, for second paragraph of his answer and for cross complaint, alleged that the entry by him of replevin bail was procured by the fraud of said Schimdt. There was a demurrer by the plaintiff to this paragraph of the answer of Lepper, which was sustained, and the correctness of this ruling is the only question in the case.

The pleading in question alleges that the entry of replevin bail was procured by the fraud, deceit, and false representations of said Conrad Schmidt, in his lifetime, in this, to wit: after the rendition of said judgment in the complaint mentioned the said Conrad Schmidt, then in life, who was an old and intimate personal friend of this defendant, and one in whose integrity this defendant, in common with others, reposed implicit trust and confidence, informed this defendant, that there was a judgment against him, Schmidt, in the clerk's office of the said county of Allen, in favor of certain persons doing business as partners under the firm name of Meyer, Brothers & Co., with whom this defendant was also acquainted, for the sum of one hundred and fifty dollars, and at the same time requested this defendant to go with him to the said clerk's office and sign an entry of replevin bail for the stay of execution on said judgment in favor of Meyer, Brothers & Co.; and this defendant avers that thereupon, to wit, on the 11th day of January, 1868, he accompanied the said Schmidt to the clerk's office, in said county, for the purpose of complying with said request; that this defendant is a German by birth and education, and cannot and could not then read English script, at all; that when said Schmidt and this defendant arrived in said clerk's office, the record containing the entry of the judgment mentioned in this complaint was produced and opened at the point where said entry appears; that the said entry of judgment or any part of the same was

not read at or before the time of the signing of said entry of replevin bail by this defendant, and that this defendant was entirely ignorant of its real contents, character and force, but that said Schmidt then and there stated and represented to this defendant that it was the same judgment in favor of Meyer, Brothers & Co., above mentioned; that the defendant implicitly believed and relied on said statement and representation of said Schmidt, and upon the faith of said statement and representation above, signed the said entry of replevin bail, understanding and believing that the judgment to which said entry of replevin bail was annexed was a judgment in favor of said Meyer, Brothers & Co., against said Schmidt, for one hundred and fifty dollars; and this defendant avers that he did not know that there was in existence any judgment in favor of John M. Nuttman against said Schmidt or any such judgment as that mentioned in the complaint, until long after said entry of replevin bail was signed, and within a short time before the commencement of this suit; and the defendant further avers that he is not, and never has been, worth over three thousand dollars, and that if he had known the real amount of the judgment to which said entry of replevin bail was attached, he would not have signed it upon any consideration; and the defendant expressly avers that all the statements and representations made by said Schmidt to this defendant in relation to said judgment, which are hereinbefore set out, were false and fraudulent and known by said Schmidt to be so, when he made them, and that he made them for the false and fraudulent purpose of deceiving and misleading this defendant, and that this defendant was deceived and misled by them, as aforesaid; wherefore the said defendant says that said entry of replevin bail in the complaint mentioned was procured by fraud, and is therefore without authority of law and void; and he asks that the plaintiff and his co-defendants may be ruled to answer hereto, and that upon the hearing, the said entry of replevin bail may be vacated and set aside, and for other proper relief.

No brief for either party is filed, and we do not know the specific objection made in the common pleas to the answer in question. We have concluded, however, that it is defective, because it does not in any way connect the judgment plaintiff or his assignee with the alleged false representations. Schmidt was the judgment defendent, and it was through his representations, as the answer alleges, that the appellant became replevin bail. Unless the representations were made by Nuttman, the judgment plaintiff, or by some one for him and with his consent or procurement, he cannot be affected by them. *Harshman* v. *Paxson*, 16 Ind. 512; Burge on Suretyship, 218.

The judgment is affirmed, with costs.

WORDEN, J., having been of counsel, was absent.

R. S. Taylor, for appellant.

J. L. Worden, *J. Morris*, *W. H. Withers*, for appellee.

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PEA *v.* PEA.

FIXTURES.—Where land is sold and conveyed, having situate upon and attached and affixed to it a steam saw-mill and machinery, if there is no reservation of the mill and machinery they will be regarded as a part of the realty, and will pass to the grantee by the conveyance.

WITNESS.—*Action by Heir.*—In an action brought by a widow as the heir of her husband, where she claims that under and by virtue of a contract made with her husband by the defendant, her husband became the owner of certain property in controversy, and that she, as the heir of her husband, has the right to compel the defendant to charge himself with the property as administrator of the husband, neither the plaintiff nor defendant is, by the last exception of the second section of the act defining who shall be competent witnesses, competent to testify as a witness as to any matter that occurred prior to the death of the husband, unless required by the opposite party or by the court.

FIXTURES.—*Reservation.*—Where the plaintiff claimed that a saw-mill and machinery, situated on a tract of land sold by the defendant to the plaintiff's husband, since deceased, was sold and passed by the conveyance, and the defendant claimed that it was expressly understood and agreed, at the time the

deed was made, that the mill was not sold, and was not to pass by the deed, the court instructed the jury as follows: "Conditions in a deed which the law does not imply must be expressed in the deed, and no verbal condition is valid which either prevents the estate from vesting, or divests it.

"No contemporaneous verbal agreement can be set up to contradict a written agreement, but the consideration of a deed may be contradicted or explained by parol, and contemporaneous verbal agreements that things which would otherwise pass as movable fixtures with the freehold, were regarded and treated by the parties as personal property and were not to pass by the deed, though no verbal agreement or condition which would defeat the estate, can be shown.

"If the jury find, from the evidence, that the mill was affixed to the land which the defendant conveyed to the husband of the plaintiff at the time the land was conveyed by deed, then, unless the defendant has shown that the deceased husband in his lifetime sold, conveyed, or in some way disposed of the mill, it will be their duty to find against the defendant, as to the mill, whatever you may find that it was worth at the death of the husband."

Held, that the giving of these instructions was error.

Held, also, WORDEN, J., dissenting, that the court should have instructed the jury (having been so requested by the defendant), that if at the time the deed was executed, the mill, boiler, engine, and fixtures pertaining thereto were treated and regarded by the vendor and vendee as personal property, and not intended to pass by the deed, they remained the property of the vendor, although not expressly excepted in the deed; and in determining the intention of the parties in that regard, the jury have the right to consider the nature and uses of such property and the previous and subsequent acts and declarations of the parties in relation thereto.

INTERROGATORIES TO JURY.—*Special Verdict.—Venire De Novo.*—Where interrogatories are submitted to a jury, and they embrace and cover all the issues in the cause, and they are answered by the jury, they may be regarded as a special verdict. Where the interrogatories do not embrace and cover all the issues, they cannot be so regarded; and if no general verdict is returned, no judgment can be rendered thereon, and the answers to interrogatories should be set aside and a *venire de novo* awarded.

JUDGMENT.—*Bond.*—In a suit to compel a defendant to charge himself with property as administrator, wherein a judgment is recovered against the defendant, it cannot be required that the defendant shall secure the judgment by giving bond, or in default thereof that an attachment shall issue against his property.

APPEAL from the Knox Common Pleas.

BUSKIRK, J.—This is a proceeding to compel Jacob Pea, the appellant, to charge himself as the administrator of the estate of William M. Pea, deceased, a son of the appellant, with, and to account for, the value of certain personal property, which is alleged to have belonged to the said William M. Pea, and with which the said appellant, as such adminis-

trator, had failed and refused to charge himself. It is alleged in the complaint, that the said decedent died intestate and without children, leaving to survive him no person but his widow, in whose name and for whose benefit this action is brought. The complaint is in five paragraphs. The first alleges that the deceased was, at the time of his death, the owner of a steam saw-mill and fixtures, which the appellant had converted to his own use. The second alleges that the appellant had converted to his own use certain sums of money, choses in action, and other personal property. The appellant demurred to each paragraph of the complaint, which was overruled, to which ruling an exception was taken. The appellant answered in two paragraphs. The appellee demurred to the second, which was overruled and an exception taken. There are no cross errors assigned. The plaintiff replied to the second paragraph of the answer in two paragraphs, to which the appellant demurred. The demurrer was sustained, and an exception taken, but no question is raised here as to the correctness of this ruling. The cause was tried by a jury. The court submitted to the jury certain written interrogatories, which were answered by the jury, but the jury did not find a general verdict. The appellant moved the court for a *venire de novo*, because there was no general verdict. This motion was overruled and excepted to. The appellant moved to set aside the answer to each of the special interrogatories, which was overruled, and an exception was taken. The appellant then moved the court for a new trial, which motion was overruled, to which ruling an exception was taken. These various exceptions are presented by bills of exceptions. The evidence is in the record.

The first error assigned is upon the action of the court in overruling the demurrer to the second paragraph of the complaint. In this paragraph it is alleged that the appellant, in 1859, sold and conveyed to William M. Pea, deceased, one hundred and fifty acres of land, and "that at the time the said deed was executed there was then situate upon, affixed

and attached to, said land a certain saw-mill, engine, boiler, fixtures, and appurtenances, of the value of $3,000; that the same was afterwards and before the death of the said William M. Pea removed from and off of said land, and, with the consent of the said Jacob, put and placed upon a tract of land then belonging to the said Jacob, for the purpose of being there used as a saw-mill, and was there used until within a few weeks of the death of said William M. Pea, when the same was taken down for the purpose of being removed to where the same now is," &c.

The objection urged to this paragraph is, that it does not affirmatively appear that the mill was sold and passed by the said deed; and in support of this position we are referred to the case of *Capen* v. *Peckham*, 9 Amer. Law Reg. (N. S.) 136. While this case and the notes of the editor contain a very full and able discussion of the question of when an article will be regarded as a fixture, and when personal property, and what a fixture is, we do not think that it settles the point under consideration. It is alleged that at the time when the deed was executed there was situate upon, and attached and affixed to the said land a certain saw-mill, engine, boiler, fixtures, and appurtenances. If the mill and machinery were situate upon, attached and affixed to, the land, then they were fixtures, and constituted a part of the realty, and passed with the land to the vendee.

In the above case, the court gave the following definition of a fixture: "Property is divided into two great divisions, things personal and real, and fixtures may be found along the dividing line. They are composed of articles that were once chattels, or such in their nature, and by physical annexation to real property have become accessory to it and parcel of it."

It was at one time held that, to constitute a fixture, it was essential that the annexation should be so permanently made that the article could not be removed without injury to the freehold, and that every article that was not thus annexed would be regarded as personalty; but this doctrine

has long since been broken down and abandoned. The rule was not founded in reason, and could not be sustained on principle. Mill-stones and water-wheels, used in milling establishments, fences, window-blinds, double windows, and doors, and the most of the machinery used in milling and manufacturing are regarded as fixtures, and yet they can all be removed without any injury to the freehold.

The Supreme Court of Connecticut, in the above case, after an examination of the English and American cases, lays down the following test of when an article will be deemed to be a fixture: "It is exceedingly difficult to lay down any rule of universal application upon this subject; but one, perhaps, that comes nearer to it than any other is, that it is essential, to constitute a fixture, that an article should not only be annexed to the freehold, but that it should clearly appear from an inspection of the property itself, taking into consideration the character of the annexation, the nature and the adaptation of the articles annexed to the uses and purposes to which that part of the building was appropriated at the time the annexation was made, and the relation of the party making it to the property in question, that a permanent accession to the freehold was intended to be made by the annexation of the article. This rule is in harmony with many of the cases. *Lawton* v. *Salmon*, 1 H. Bl. 259; *Murdock* v. *Gifford*, 18 N. Y. 28; *Winslow* v. *Merchant's Ins. Co.*, 4 Met. 306; *Teaff* v. *Hewitt*, 1 Ohio St. 511, 540."

The rule in regard to trade fixtures is made very liberal in favor of the tenant, in order to allow him to remove whatever he places upon, or even temporarily annexes to, the freehold, for more convenient use; while in favor of the grantee or mortgagee these trade fixtures are held to pass. *Climie* v. *Wood*, Law R. 3 Exch. 257; *Capen* v. *Peckham*, *supra*, and note. We think that it is quite clear that where land is sold and conveyed, having situate upon, and attached and affixed to it, a steam saw-mill and machinery, without any reservation of the mill and machinery, the mill and ma-

chinery will be regarded as a part of the realty, and will pass to the grantee by the conveyance of the land. The ruling of the court in overruling the demurrer to the second paragraph of the complaint was correct.

On the trial of the cause, the appellant offered himself as a witness in his own behalf, and demanded of the court, as a matter of right, that he might be sworn and permitted to testify in the said cause. The appellee objected, and the court refused to allow him to be sworn, or to testify as a witness in the cause, on the ground that he came within the exceptions of the statute allowing parties to testify.

The exception, so far as it affects the question under consideration, is in these words: "Provided, that in all suits where an executor, administrator, or guardian is a party in a case where judgment may be rendered either for or against the estate represented by such executor, administrator, or guardian, neither party shall be allowed to testify as a witness, unless required by the opposite party or by the court trying the cause, except in cases arising upon contracts made with the executor, administrator, or guardian of such estate."

To bring a case within the above exception, two things must concur, first, an executor, administrator, or guardian, must be a party; second, it must be a case where a judgment may be rendered either for or against the estate represented by such executor, administrator, or guardian. The judgment must be either for or against the executor, administrator, or guardian, in his fiduciary character. If the plaintiff is an executor, administrator, or guardian, the judgment would belong to the estate, and it would increase the assets. If the action was against an executor, administrator, or guardian, based upon a debt or demand against the estate, the judgment would have to be paid out of the assets of the estate, and would, to that extent, diminish the assets. In such an action, neither party can be a witness, unless required by the opposite party or the court trying the cause.

This court, in the case of *Upton* v. *Adams' Ex'rs*, 27 Ind. 432, held that the word party, as used in the above proviso,

did not mean that he was to be a mere nominal party, but he must be a party to the issues and interested therein, or, in other words, that a judgment could be rendered either for or against him.

This court, in the case of *Shaffer* v. *Richardson's Adm'r*, 27 Ind. 122, held that the above proviso was intended to cover a case where the suit was brought by or against an executor, administrator, or guardian, to recover a judgment upon a claim, debt, or demand due to or from the estate of the person represented by such executor, administrator, or guardian. That the judgment must either increase or diminish the assets of the estate.

This court, in the case of *Thom* v. *Wilson's Ex'r*, 24 Ind. 323, held, that, to bring a case within the above exception, it was necessary that the judgment should be against the testator's estate.

We have given this question our most careful and mature consideration, but we have been unable to agree. Two members of the court are of the opinion that the appellant was a competent witness, for the reason that the action was against him personally, and not against him as administrator, and that, in this proceeding, no judgment could be rendered either for or against the estate of William M. Pea. The two other members of the court are of the opinion that he was an incompetent witness, for the reason that a judgment requiring him to inventory and account for the property in controversy was, in effect, a judgment in favor of the estate, as it would have the effect to increase the assets of such estate.

It is also claimed by the appellee, that the appellant was incompetent under another exception of the statute in question. That exception is in these words: "And provided further, that in all suits by or against heirs, founded on a contract with, or demand against, the ancestor, the object of which is to obtain title to, or possession of, land, or other property of such ancestor, or to reach or affect the same in any way, neither party shall be allowed to testify as a wit-

ness as to any matter which occurred prior to the death of such ancestor, unless required by the opposite party, or by the court trying the cause."

This action is brought by the plaintiff as the heir of her husband, and she claims that under and by virtue of a contract made with her husband, who was her ancestor, by the appellant, her said husband became the owner of the mill and machinery in controversy, and she as his heir has the right to compel the appellant to charge himself with the same, and that the appellant was incompetent to testify in reference to the parol agreement relied on by him as to the mill and machinery, for the reason, that he set up and relied upon a contract made with her ancestor in reference to real estate.

We are of opinion that under the exception in the statute under consideration, in this proceeding, neither the plaintiff nor defendant were competent to testify as witnesses as to any matter which occurred prior to the death of William M. Pea.

The next error assigned arises upon the action of the court in giving, and refusing to give, certain instructions. The instructions are too long to be copied into this opinion.

One of the issues involved in the case was, whether a certain mill and the machinery thereof, that was situate on a tract of land sold by the appellant to the deceased, was sold and passed by the conveyance. The appellant insisted that he did not sell the mill; that it was expressly understood and agreed at the time when the deed was made that the mill was not sold and was not to pass by the said deed. Upon this point, the court, of its own motion, instructed the jury as follows:

"Conditions in a deed which the law does not imply must be expressed in the deed, and no verbal condition is valid which either prevents the estate from vesting or divests it.

"No contemporaneous verbal agreement can be set up to contradict a written agreement, but the consideration of a deed may be contradicted or explained by parol; and con-

temporaneous verbal agreements, that things which would otherwise pass as moveable fixtures with the freehold, were regarded and treated by the parties as personal property, and were not to pass by the deed, though no verbal agreement or condition which would defeat the estate, can be shown."

The court, at the request of the plaintiffs, upon the point under consideration, gave the following instruction, namely:

"If the jury find from the evidence that the mill in controversy in the case was affixed to the land which Jacob Pea, the defendant, conveyed to William M. Pea, the decedent, at the time the land was conveyed, by deed read to them in evidence, then, unless the defendant has shown by sufficient evidence that the said decedent in his lifetime sold, conveyed, or in some other valid manner disposed of the mill, it will be their duty to find against the defendant as to the mill, whatever they may find from the evidence that it was worth at the death of the said decedent."

The defendant requested the court to give the jury the following instruction, namely:

"If at the time the deed given in evidence was executed by said Jacob to William, the mill, boiler, engine, and fixtures were treated and regarded by said Jacob and William as personal property, and not intended to pass by the deed, they remained the property of said Jacob, although not expressly excepted in the deed; and in determing the intention of the parties in that regard, the jury have the right to consider the nature and uses of such property, and the previous and subsequent acts and declarations of the parties in relation thereto." But the court refused to give the instruction as asked, but gave the same with the following qualification. "But that if the same was regarded, not as personal property, but as a fixture, such reservation could not be made by a contemporaneous verbal agreement."

It is somewhat difficult to harmonize all these various instructions, but construing them altogether, they amount to this: that if the mill and machinery were personal property, they could have been reserved by a contemporaneous ver-

bal agreement, but if they were fixtures then they could only be reserved by an express reservation in the deed of conveyance.

If the mill and machinery were fixtures then they constituted a part of the land, and the legal effect of the deed was, *prima facie*, to pass to the grantee all that constituted a component part of the realty, unless it was competent for the parties by a contemporaneous verbal agreement to qualify the legal effect of the deed, and reserve to the grantor the mill and machinery. The precise point has never been decided by this court, but there are several decisions which involve the same principle.

It is a well settled principle of law, that a deed absolute and with general warranty may be shown by parol evidence to have been intended as a mortgage.

It was held in *Allen* v. *Lee*, 1 Ind. 58, that a general covenant of warranty did not extend to a lease that was upon the premises conveyed, where the vendee made the purchase and took the conveyance with notice of the existence of the lease and had agreed to take the land subject to such easement. The court held that parol evidence of such agreement was admissible, not to contradict the deed, nor to give a construction to the contract contrary to the written terms of it, but as a part of the *res gestæ*, to prove the state of facts existing at the time of the conveyance, and that the encumbrance in question was not within the purview of the contract.

The principle settled in the above case was again recognized as authority and followed by this court, in the recent case of *Pitman* v. *Conner*, 27 Ind. 337, in which Pitman sued Conner for a breach of covenant against incumbrances in a deed executed by the latter to the former. At the time of the conveyance, there was an outstanding mortgage on the land conveyed, in favor of one Clark, which Pitman subsequently paid off. Conner answered, that before and at the time of the conveyance, Pitman agreed, as a part of the consideration for the sale and conveyance of the property,

to discharge the said mortgage. It was held that the answer was good, and might be proved by parol evidence.

This court, in *Heavilon* v. *Heavilon*, 29 Ind. 509, held, that, "as between vendor and purchaser, the crops growing upon the land at the time of the conveyance go with the land to the purchaser," but that "where, at the time of the purchase, the growing crops are reserved by the vendor, as a part of the consideration of the sale, the agreement, though by parol, is valid. The agreement only affects the consideration of the deed, which may always be proved or explained by parol evidence."

We are aware that the decisions of this court on the point under discussion, are not uniform and consistent with each other.

In *Chapman* v. *Long*, 10 Ind. 465, it was held, that "where a sale of real estate precedes the execution of the deed by some time, a verbal reservation to anything that would legally pass by the deed without such reservation will be presumed to be merged in the deed, and where the deed is executed at the time of the sale, such reservation will be considered in the light of an exception or defeasance, and being repugnant to the legal effect of the deed, will be held void."

In *Turner* v. *Cool*, 23 Ind. 56, the above decision was referred to and approved, but this case was in express terms overruled in *Heavilon* v. *Heavilon*, 29 Ind. 509.

The rulings in 10 and 23 Ind. *supra*, are sustained by the following authorities: Rawle on Cov. 612; *Williams* v. *Morgan*, 15 Q. B. 782; *Conner* v. *Coffin*, 2 Fost. N. H. 538; *Foote* v. *Colvin*, 3 Johns. 216; *Creigh* v. *Beelin*, 1 Watts & Serg. 83; *Wilson* v. *M'Neal*, 10 Watts, 422.

The rulings in 1, 27, and 29 Ind. *supra*, are sustained by the following authorities: *Leland* v. *Stone*, 10 Mass. 459; *Schuyler* v. *Russ*, 2 Caines, 202; *Morris* v. *Whitcher*, 20 N. Y. 41.

In *Morris* v. *Whitcher*, *supra*, it is said: "In all cases, then, where there are stipulations in a preliminary contract for the sale of land, of which the conveyance itself is not a perform-

ance, the true question must be whether the parties have intentionally surrendered those stipulations. The evidence of that intention may exist in or out of the deed. If plainly expressed in the very terms of the deed, the evidence will be decisive. If not so expressed, the question is open to other evidence, and I think, in the absence of all proof, there is no presumption that either party, in giving or accepting a conveyance, intends to give up the benefit of covenants of which the conveyance is not a performance or satisfaction."

The question is not free from difficulty and doubt. The decisions in the several states are in direct conflict. The decisions of this court are in conflict, and cannot be harmonized. The later decisions of this court have overruled, in direct terms and in principle, the older decisions. We are inclined to follow the later decisions, believing them to be more in consonance with the tendency of the modern and more liberal rule of construction. The question, however, greatly depends upon the nature and character of the fixture reserved, and the manner in which it was attached to the soil, and the purposes for which it was used.

Let us illustrate our meaning. Suppose there had been upon the land conveyed by the appellant to the decedent a large steam flouring mill, firmly and securely attached to the land. In such a case, there would be much less reason, if any, for permitting a parol reservation than in the case under consideration, where the saw-mill had much slighter attachments, and, as is shown by the evidence, was removed from place to place. While it was a fixture, it cannot be regarded as a permanent one, as in the case of the steam flouring mill, but was intended to be removed from point to point, it being more convenient to remove the mill than to haul the sawlogs to the mill. We think, under these circumstances, there may have been a reservation by parol, and that the court erred in giving the instructions set out in this opinion, and in refusing to instruct as requested by the appellant, as set out in this opinion.

The next error complained of is as to the sufficiency of

the verdict. There was neither a general nor special verdict. The court submitted to the jury certain interrogatories, to which answers were returned. This court has, in several recent cases, held, that where interrogatories were submitted and answered, which embraced and covered all the issues in the cause, they might be regarded as a special verdict. The interrogatories in this case do not seem to have been prepared with much care, and the answers thereto are neither full nor consistent with each other. Nor do they cover all the issues in the case. The plaintiff alleges in the complaint that she was the widow and sole heir of her late husband. This allegation was denied, and this imposed upon her the necessity of proving its truth. The interrogatories submitted to the jury did not cover this issue; and for that reason, they cannot be regarded as a special verdict. The interrogatories did not amount to a special verdict, and there being no general verdict, the jury had no right to find specially upon questions of fact. The court erred in overruling the motion of the appellant to set aside the answers to the interrogatories and to award a *venire de novo*.

The next error assigned relates to the action of the court in overruling the motion for a new trial and in rendering the kind of judgment that is found in the record.

The judgment is in these words: "It is therefore considered and adjudged by the court that the said Jacob Pea, as such administrator of the estate of William M. Pea, charge himself with the mill described in the complaint herein, and that he account for the same to this court, and, also, that he charge himself and account to this court for the additional sum of one thousand two hundred and twenty-one dollars and forty-five cents, and in default of accounting for said mill, that he charge himself with the sum of fifteen hundred and fifty dollars, the value thereof. And it is further ordered that he secure the said sums of money by bond, with good and sufficient surety, in the sum of twenty-seven hundred and seventy-one dollars and forty-five cents, payable to the State of Indiana for the use and benefit of

the creditors and heirs of said estate; said bond to be filed within twenty days from this date; and if he fail to file such bond within such time, that an attachment issue herein against his property for said sum of twenty-seven hundred and seventy-one dollars and forty-five cents."

In our opinion the above judgment was neither authorized by the statute or justified by the evidence, and is consequently erroneous. This was a proceeding to compel the appellant to charge himself with certain property. There was neither a general nor special verdict upon which any judgment could have been rendered. It seems to us, that from the evidence in the cause, the appellant was required to account for the mill or its value, and also for the money which William M. Pea had paid in part payment for such mill; but we may not understand the evidence, it being voluminous and very much confused. Besides, the judgment of the court is based upon the theory that the plaintiff was the sole heir of her late husband. It is disclosed in the evidence that the decedent left a father and widow. In such a case, the widow would inherit three-fourths and the father one-fourth. We have been unable to find any law that justified the court in requiring the appellant to give bond to secure the judgment, and in default, that an attachment should issue, not against him personally, but against his property. The court of common pleas has the power to require an administrator to give an additional bond in certain cases, but that would be in another and different proceeding.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

WORDEN, J.—From so much of the foregoing opinion as holds that anything that would otherwise pass to the grantee by the terms of a deed, and in accordance with its legal effect, can be reserved to the grantor by parol, I dissent. I

cannot yield my assent to such doctrine, which I regard as an innovation upon, and a departure from, long and thoroughly established principles of law. There is no reason, satisfactory to my mind, why the familiar doctrine that parol evidence of a previous or contemporaneous agreement or understanding cannot be admitted to contradict, enlarge, diminish, or otherwise vary the legal effect of a written agreement, should not be applied to deeds of conveyance, as well as other written instruments. If the deed does not express the real agreement of the parties, and has been executed under circumstances that entitle either party to a reformation, it may be reformed in the same manner as other written instruments may be reformed.

If one thing that would otherwise pass by the deed may be reserved by parol, another may. If a fixture that would otherwise pass by the deed, or growing crops on the land, may be reserved by parol, why not the fences, or the houses, or, indeed, a part of the land itself?

Where shall the line be drawn, if such line can be drawn, between what can, and what cannot, be reserved by parol?

It would probably be of little practical use to enter upon any fuller discussion of the doctrine advanced on the subject and sanctioned by a majority of the court; I therefore content myself with this statement of my dissent therefrom.

W. E. Niblack, *W. H. DeWolf*, *T. R. Cobb*, and *N. F. Malott*, for appellant.

J. C. Denny, *G. G. Reily*, and — *Johnson*, for appellee.

BROOKE and Others v. FILER and Others.

REVIEW OF JUDGMENT.—*Want of Jurisdiction of Courts over Suits between Citizens of States at War.*—An action was brought by a citizen of the State of Virginia against a citizen of the State of Indiana, in a state court, on the 14th day of May, 1861, for an accounting of a long standing trust for the sale of a large quantity of lands, for setting aside contracts and conveyances for fraud, recovering money alleged to be due, enforcing liens, &c., and judgment was rendered on the 21st day of August, 1863, and a suit was brought by the plaintiff to review the proceedings and judgment on the 19th day of April, 1866.

Held, that the courts must take judicial notice of the fact that before, at, and after, the rendition of the judgment sought to be reviewed, Virginia, one of the Confederate States, was at war with Indiana, one of the adhering or loyal states of the Union; and that it was error of law to render the judgment in the proceeding which had been commenced in the state court, no jurisdiction remaining in said court for that purpose; and the plaintiff was therefore entitled to a review of the judgment.

APPEAL from the Marshall Circuit Court.

PETTIT, J.—It is proper to state that David G. Rose was originally one of the defendants in this suit, and that during its progress his death was suggested, and Filer and wife, being his heirs, were made defendants in his stead.

This was a suit brought to review the proceedings and judgment in a former suit in said court, under the statute, 2 G. & H. 279. The original suit was commenced on the 14th day of May, 1861, and final judgment was rendered on the 21st day of August, 1863, and this suit for review was commenced April 19th, 1866, less than three years after the rendition of the original judgment. The record of the original case is made a part of the complaint in this proceeding, and shows that that suit was brought for an accounting of a long standing trust for the sale of a large quantity of lands, for setting aside contracts and deeds for fraud, recovering money alleged to be due on sale of real estate, enforcing liens, &c., by citizens of Virginia against citizens of Indiana.

After setting out, at great length and circumstantially, the whole history of the transactions and the great wrongs the

appellants have suffered, and that they had no knowledge of the commencement, progress, or termination of the original suit until our late civil war was over, newly discovered facts, &c.; the complaint for review concludes as follows:

"In the latter part of 1860, or the early part of 1861, he does not remember which, the complainant, having previously assigned his interest under said contract to J. R. Tucker, of Richmond, in trust, to secure some debts that he owed to certain creditors of his in Virginia (which assignment has lately been surrendered to complainant, and is now in his possession and will be exhibited if required), sent by mail the rough draft of said contract, signed by himself as aforesaid, to a lawyer residing in Laporte, with a request to him to take such legal steps as he might think necessary, to force the payment by the said Rose of the amount due thereon. To this letter, the complainant never received any answer from the said lawyer, and the war between the United States, and the Confederate States breaking out soon after, the complainant never knew whether his said letter had ever been received by the said lawyer, or whether he had ever taken any legal steps to compel the payment of the money due on said contract, during the whole time the said war continued. In the month of May, 1865, the war being then ended, and complainant being still in ignorance as to the fate of his letter to the said lawyer, whether he had ever received it or not, or whether if he had, any or what proceedings had been instituted to recover the amount due by said Rose, upon said contract, wrote another letter to said lawyer, making these enquiries. To this last letter the said lawyer made no reply until some four months after it was written, when the complainant received the first information from him of the institution of a suit to recover the amount due on said contract, and of the decree now sought to be reviewed. In the meantime a correspondence had been opened by the complainant, with A. C. Capron, of Plymouth, Indiana, through which he was first informed of the proceedings in said suit and advised of the necessity of taking some steps immediately, to

have said decree reviewed and reversed. The complainant thereupon left his home in Richmond, and went to Plymouth, where he arrived in the month of March, 1866, and during his investigations, then made, into the character of the defense set up in said suit by the said Rose, and of the records of the counties in which the said lands are situated, and from conversations with persons acquainted with the value of the said lands, he first discovered the fraud the said Rose had practised upon him in procuring the said contracts of 1847 and 1850, and he now alleges that the consideration of the said last mentioned contract was grossly and wholly inadequate, and that both said contracts were made by him with the said Rose in utter and entire ignorance of the real or true value of the property affected by them; that the said property was many times more valuable than it was represented to be by the said Rose at the time he procured the said contracts from the complainant; that, as will be seen by reference to the records of the deeds made by the said Rose, as the agent of the complainant, to purchasers of the said trust lands, the said Rose at the date of the said contract of the 18th of September, 1847, had already sold more than thirty thousand dollars worth of said lands, and then held in his hands, either as money or bonds, given for the purchase-money, more than twenty-five thousand dollars, of which he had never rendered to the complainant any proper account, and of which the complainant knew nothing at the time he made said contract; and the complainant now believes and charges that the advances referred to in said contract, as having been made by the said Rose to the complainant, and which he then believed to have been made from the said Rose's own money, were in truth made from the money received by him as agent, from the sale of the said trust lands; and the complainant says that he never would have made said contracts with the said Rose if he had been informed at the time of the true value of the interests he had purchased of the bank and the said Cabbell, and of the quantity of land that had been sold by the said

Rose, as his agent, and the amount of the purchase-money the said Rose then held in his hands, and that the advances made to him as aforesaid had really been made out of his, complainant's, own money; and that the said Rose, by withholding from him this information, which it was his duty as his agent to have given him, and by his false representations hereinbefore referred to, fraudulently procured the said contract to be made with him by the complainant. The said Rose continued to sell portions of the said trust lands, and the lands owned by the said complainant, individually and jointly with the said Tucker, from the date of the contract of 1847 until that of July, 1850, without rendering to said complainant any account of his transactions, as his agent, or remitting him any money, or giving him any true information of the quantity or value of the lands so sold by him and (as will also appear by reference to the said deeds of record in said counties) he had then sold more than fifty thousand dollars worth of said lands, and there was then due from him, on account of his sales of said lands as agent of the complainant, as trustee, and in his own right, more than thirty thousand dollars, after allowing a sum sufficent to pay the debt to the said Fagen, and to reimburse to himself the amount he had advanced to the said complainant, as hereinbefore mentioned. Besides this, as will also appear by reference to said records, there were more than twelve thousand acres of said trust lands, and more than half the lands owned by the said complainant, individually and jointly with the heirs of the said Tucker, remaining unsold, when said contract of 1850 was obtained from said complainant, which have since been sold by said Rose, or taken under execution against him, to an amount exceeding eighty thousand dollars; and the complainant avers that it was untrue, as represented by the said Rose, at the time of the making said contract, that the trust and other lands then remaining unsold were of small value and difficult of sale, or that the purchase-money could not easily be collected; on the contrary, the complainant avers that the said

trust and other lands were at all times, after they were placed in the hands of the said Rose, as his agent, of vastly more value than they were represented by him to be, to the complainant, and that the information possessed by the said Rose, as to their real value, was purposely withheld from him by said Rose, with the intent to purchase his interest at a smaller price and upon more favorable terms to himself than he could otherwise have purchased it, the said Rose well knowing at the time of said contract that the complainant had no information as to the true value of said property, or of anything respecting it, but such as he had given him as his agent, and that complainant had neither sought nor obtained any such information from any other source.

"The said complainant further avers that the said lawyer, neither at the time of the institution of the said original suit, nor at any time during its progress to the decree complained of, had any communication, written or verbal, with either of the complainants, or any correct knowledge of the facts of the case, as hereinbefore stated, or of the nature of said contract. That at the time he was employed as the attorney of said Brooke & Tucker to institute a suit in some court of the State of Indiana having jurisdiction in the case, against the said Rose, to recover the sum due on said contract, they were both citizens of the State of Virginia, residing in the city of Richmond in that state, as the said lawyer and the defendant well knew, and the said Rose and the said lawyer were citizens and residents of the State of Indiana; and that peace then prevailed in all parts of the United States, but that when the said original complaint was filed in this court a civil war had begun between what was then called the Confederate States of America, of which Confederacy the said State of Virginia was a member, and the government and the people of the United States, of which Indiana was a member. The armies of the two sections were in hostile array, each against the other, and each section had recognized the other as a belligerent power, to be governed in their intercourse, and in respect to the

duties and obligations of the citizens of each, by the laws of nations (all of which was well known to the said lawyer and to the defendants) when in a state of war; and that, according to the well recognized principles of said laws, the authority given by the said complainants, Brooke & Tucker, to said lawyer to institute said suit was either suspended or revoked and annulled; that the said civil war continued to be waged between the said government of the United States and the said Confederate States during the whole progress and proceedings in the said suit in this court, and when, and until after the said decree was rendered; and that during all that time, the said Brooke & Tucker were both of them residents of the city of Richmond and State of Virginia, one of the said Confederate States, and the said Rose and the said lawyer were citizens and residents of the State of Indiana, one of the United States, as was well known to the said lawyer and said defendants; that in the then state of public affairs, the said complainants, if it had been possible for them, or either of them—which it was not—to have been personally present at the time said original complaint was filed by the said lawyer, would not have been permitted by law to institute said suit, and the said lawyer could have no authority, as their agent, to do for them in their absence what they would not have been permitted to do if present. The complainant therefore insists that as the said suit was instituted, continued, and ended without any authority from them or either of them to the said lawyer to appear as their attorney, they ought not to be held bound by the decree which has been rendered therein; and they pray that the same may be annulled and set aside. In consideration whereof, the complainants ask the court to review said judgment and decree against them as hereinbefore stated, and to reverse said judgment and decree, and adjudge the same to be null and void, and to restore the said complainants to their conditions, as regards said contract with said Rose, in which they stood before said decree was rendered. And will your Honor further order, adjudge, and decree that the

said contracts with the said Rose of the 18th of September, 1847, and July, 1850, were procured by fraud, and that the same be set aside and your complainants remitted and restored to all their rights in respect to all the property embraced in said contracts in the same manner and to the same extent as if said contracts, had never been made; and will your Honor further order, adjudge, and decree that the deed made by the said Rose to the said Everhart for the lands designated therein and conveyed by the said Rose as the pretended agent of the complainant, was and is null and void, and that the same be delivered up to be canceled, and that all the right, claim, and title of the said Everhart, and all persons claiming under him, be vested in and conveyed to the complainant; and will your Honor grant such other and further relief to the complainant as the justice of the case demands."

We take judicial notice that before, at, and after, the rendition of the judgment sought to be reviewed, Virginia, one of the Confederate States, was at war with Indiana, one of the adhering or loyal states of the Union. We hold that it was error of law, the court having no legal power to do so, to render the judgment, and this entitles the party to a review of it. All the authorities, without a dissent, and they are numerous, concur in this. In *Livingston* v. *Jordan*, 10 Amer. Law Reg. (N. S.) 53, Chief Justice CHASE says: "The jurisdiction of the state court over the plaintiffs, whatever it was, terminated when the civil war broke out." *United States* v. *Grossmayer*, 9 Wall. 72; *The Kanawha Coal Company* v. *The Kanawha and Ohio Coal Company*, 7 Blatchf. 391, and cases there cited; *Knæfel* v. *Williams*, 30 Ind. 1; *Perkins* v. *Rogers*, 35 Ind. 124. The authorities are uniform on this question.

Under the facts shown in the complaint for review, the appellants were entitled to the relief sought. The appellees have not furnished us with a brief, but we do not wonder that they have not put themselves to that trouble.

The judgment is reversed, at the costs of the appellees;

cause remanded, with instructions to the said circuit court to overrule the demurrer to the complaint for review, and for further proceedings, &c.*

S. I. Anthony, F. Church, S. E. Perkins, and *S. E. Perkins, Jr.,* for appellants.

J. Bradley, L. A. Cole, T. A. Hendricks, O. B. Hord, and *A. W. Hendricks,* for appellees.

* Petition for a rehearing overruled.

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WAY v. THE STATE.

CRIMINAL LAW.—*Presumption.*—The possession of articles recently stolen raises a presumption of guilt. But this presumption is not conclusive, and may be overcome by proper evidence.

SAME.—*Evidence.*—Defendant was charged with stealing a shawl and vest on June 1st, 1870. The shawl was found in his possession on July 12th of said year. On the trial, the defendant proved that in said month of June or July he purchased from a stranger a gun and shawl, or army blanket, which looked like the shawl found in his possession. He then offered to prove that said gun was the same as that found in his possession as aforesaid.

Held, that the offered evidence was competent to go to the jury.

APPEAL from the Wayne Criminal Court.

BUSKIRK, J.—The appellant was indicted for the larceny of a shawl and vest, the property of one John C. Reed, was tried by a jury, found guilty, and sentenced to one year's imprisonment in the state prison, where he now is.

There was a motion for a new trial made and overruled, and proper exceptions taken. The evidence is in the record by bill of exceptions. There was a motion in arrest of judgment, which was overruled, and an exception was taken.

The reversal of this case is mainly insisted upon for the alleged error of the court in excluding, over the objection

of the appellant, competent and material evidence from the jury. It appears, from the bill of exceptions, that the shawl charged to have been stolen was found by the sheriff in the defendant's possession on the 12th day of July, 1870. It was also shown by the testimony of one Ferdinand Dye, that in the month of June or July of that year, "he saw the defendant buy of a stranger a gun and an army blanket or shawl; he thought it was an army blanket, but paid little attention to it. It was gray, and in appearance looked like the shawl before him" (which had been proven to be the one stolen).

The appellant then offered to prove by the sheriff, then in court, that the gun then in the court house was the same found by him in the defendant's possession on the 12th day of July, 1870; but the prosecuting attorney objected, and the court sustained the objection, and the testimony was excluded. The appellant then offered to prove, by the said Ferdinand Dye—a competent witness then present—that said gun, found by the sheriff in the possession of the said defendant on the 12th day of July, 1870, was the identical same gun he saw said defendant buy of a stranger in June or July, but the State, by her prosecuting attorney, objected, and the objection was sustained, and the testimony was overruled.

These rulings were clearly erroneous and prejudicial to the rights of the appellant. The appellant was charged in the indictment with the stealing of a shawl and vest. There was no positive evidence that he had stolen the articles charged. The State demanded his conviction upon the proof that Reed had lost the articles, and that the same were recently afterwards found in the possession of the appellant. The possession of articles recently stolen—the possession being unaccounted for—raises a presumption that the person in whose possession the same are found is the thief. This presumption is not conclusive, but may be repelled and overcome by evidence showing, or tending to show, how the accused came into the possession of the

goods. The appellant offered to overcome this presumption by proof that he had come into the lawful possession of the goods by purchase from a stranger. He was permitted and did prove that he had, in June or July, 1870, purchased a gun and an army blanket, or shawl, from a stranger, but the witness was unable to fix the precise time when such purchase was made, or to identify with certainty the blanket produced on the trial as the one he saw him purchase. The larceny is charged in the indictment to have been committed on the first day of June, and, at all events, it must have been prior to the 12th of July, when the shawl was found in the possession of the defendant. If this testimony had been admitted by the court, it would have strongly tended to establish the fact, about which the witness Dye was not clear, that the purchase which he saw the defendant make was prior to the 12th day of July, and this testimony would certainly have had a legitimate and proper bearing upon the minds of the jury in determining whether it was a blanket or a shawl he saw the defendant purchase. It was not pretended, on the trial, that the gun which was found in the possession of the defendant, and was produced in court, was the property of Reed, and that it had been stolen. The issue in the case was as to the guilt or innocence of the defendant in stealing a shawl and vest, the property of said Reed, and the defendant had the undoubted right to repel the presumption of guilt which attached to him by reason of the stolen property being found in his possession. But we have shown that this presumption is not conclusive. The presumption is overcome when the party, in whose possession the stolen property is found, proves that he purchased the property from another person; and it is weakened when the party charged proves facts naturally tending to show that he bought the property, and did not steal it. The evidence offered and excluded had a tendency to disprove the charge, by showing that the defendant, prior to the time when the property was found in his possession, purchased a gun, and probably the stolen shawl, of a

stranger. The evidence offered as to the gun, if it had been admitted, would have identified it as the gun bought in Dye's presence, and might have had some influence on the minds of the jury in determining the question about which Dye was uncertain, and that was, whether it was a blanket or a shawl he saw the defendant purchase. Innocent men are frequently found in the possession of stolen property, and if, when accused of the larceny, they are denied the right of proving facts tending to show that they came into the possession of the stolen property honestly and lawfully, great injustice would be done. This principle of law is so well settled by elementary writers, by adjudicated cases, and the plainest principles of justice, that we de not feel called upon to cite authorities in support of it.

The court erred in excluding the evidence. The conclusion to which we have arrived renders it unnecessary for us to express any opinion upon the question presented by the motion in arrest of judgment.

The judgment is reversed, with costs, and the cause is remanded, with directions to the clerk to certify this opinion immediately, and for the return of the defendant from the state prison to the jail of Wayne county, and to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

W. A. Peele and *H. C. Fox*, for appellant.

B. W. Hanna, Attorney General, for the State.

SIMONDS *v.* HOOVER.

AGENCY.—Where A. was the agent of B. for the sale of certain real estate, and C., knowing of the agency, came to A. and effected an exchange of his own real property for that of B.

Held, that A. could not charge C. for his services.

SAME.—Where A. was the agent of B. to sell certain real property, and was employed by C. afterwards to dispose of certain real estate for him, and he effected an exchange of the property between B. and C.

Held, that A. could not charge C. a commission for effecting the exchange.

APPEAL from the Wayne Common Pleas.

PETTIT, J.—This suit was commenced before a justice of the peace by the appellant against the appellee on this account:

"RICHMOND, January, 1st, 1869.

"George Hoover to Andrew W. Simonds, Dr., to commission on sale of property to D. K. Zellers, forty dollars; to commission on sale of property to James Cook, one hundred dollars; total one hundred and forty dollars."

The defendant answered, first, by general denial; second, by set-off for oats and corn delivered. Trial by jury; verdict and judgment for the defendant; and an appeal; and in the common pleas, there was a trial by jury; verdict and judgment again for the defendant. At the proper time, a motion was made for a new trial, for these reasons: first, the verdict is contrary to the evidence; second, the verdict is contrary to law; third, the court erred in giving charge number one, because the same is not the law as applicable to the evidence in this case; fourth, the court erred in giving charge number two, because the same is not the law as applicable to the evidence in this case; fifth, the court erred in giving charge number three, because the same is not the law as applicable to the evidence in this case. The motion was overruled, and exception taken. The overruling of the motion for a new trial, and giving instructions one and two, are assigned as error. The instructions are as follows:

"If the jury believe from the evidence that the plaintiff, Simonds, was the agent of one Zellers for the sale of certain real estate, and that the defendant, Hoover, knowing that fact, came to him to effect an exchange of property, owned by defendant, for the property owned by Zellers, then the plaintiff cannot recover for his services in effecting such change."

"If the jury believe from the evidence, that the plaintiff

was a real estate agent in Richmond, and as such employed by Zellers to sell certain real estate belonging to said Zellers, and they further believe from the evidence, that the defendant, Hoover, afterwards employed said Simonds as such real estate agent to sell certain real estate belonging to said Hoover, and an exchange of said pieces of real estate is effected between said Zellers and Hoover, through the agency of, or by the means of, said Simonds, then said Simonds cannot recover from Hoover compensation for effecting such exchange, unless he shows that at the time such exchange was effected, he had ceased to be the agent of Zellers." The record shows that this instruction was given in relation to the Cook transaction, as well as that of Zellers.

The evidence is in the record, and shows that such circumstances and transactions as are contemplated by the instructions existed, and we have no doubt as to their correctness. Law and morals (which are the same) alike forbid that a man shall be the agent of two persons, and receive pay from both, in the transaction of business between them, where their interests are antagonistic. He cannot, or at least, he is not likely to discharge his duty with fidelity to both. Numerous authorities might be cited fully confirming this ruling, which are well referred to in the appellee's brief, but it is not necessary to quote from or refer to them, as the case properly turns and must be determined on another point. The evidence is directly contradictory, and would have justified a verdict either way, had the jury believed it. Simonds swore that Hoover employed him, and there is some corroborating evidence on his part. Hoover swears directly the reverse; and two juries having found a verdict for Hoover, we cannot say that the finding was wrong, but must say it was right, as the evidence in the record warranted it. If, therefore, the instructions were erroneous (but we hold they were not), they could not have prejudiced or injured the appellant.

Where the verdict is warranted by the evidence, of the weight of which, and the credibility of the witnesses, the

jury is the exclusive judge, the judgment will not be reversed by this court. *White* v. *Jackson*, 15 Ind. 156; *Brooster* v. *The State*, 15 Ind. 190; *Amick* v. *O'Hara*, 6 Blackf. 258; *Hooker* v. *The State*, 7 Blackf. 272; *Casteel* v. *Casteel*, 8 Blackf. 240.

The judgment is affirmed, at the costs of the appellant.

W. A. Bickle, for appellant.

Washburn & Spencer, for appellee.

LEACH, Executor, *v.* PREBSTER.

EXECUTOR DE SON TORT.—*Liability.—Will.—Widow.*—By the terms of a will the estate was given to the widow of the testator "for her own use and benefit or maintenance during her natural life," and at her death all of said property "not used for her maintenance during her natural life" was given to another person. A person acting under her direction sold a horse and some hogs belonging to the estate and paid some debts of the estate with part of the proceeds; purchased supplies for the use of the widow with another part, and put the remainder at interest for her.

Held, that the widow could not sell or authorize the sale of the property, and the person so acting under her direction became an executor *de son tort*.

SAME.—The executor, as well as a creditor, may sue an executor *de son tort*.

SAME.—An executor *de son tort* is entitled to credit for debts paid by him on account of the estate, where there are sufficient assets to pay all the debts; otherwise, in proportion to the amount of the assets as compared with the debts of the estate.

APPEAL from the Hendricks Common Pleas.

DOWNEY, C. J.—Upon the trial of this cause, which was brought by the appellant against the appellee, by the court, without the intervention of a jury, there was a finding for the defendant, motion for a new trial made and overruled, and judgment for the defendant.

The only error properly assigned is the refusal of the

court to grant a new trial. The reason assigned for a new trial in the common pleas was, that the finding of the court was not sustained by the evidence, and was contrary to law.

The complaint was in two paragraphs, by the plaintiff as executor of the will of Frederick Prebster, deceased, against the defendant as *executor de son tort.* In the first paragraph it is charged that the defendant unlawfully intermeddled with, and appropriated to his own use, a certain black horse, part of the personal estate of said deceased; and in the second paragraph he is charged with wrongfully and unlawfully intermeddling with, and appropriating to his own use, twenty hogs, also part of the said estate.

The answer was a general denial.

The evidence is set out in a bill of exceptions. In our judgment, it makes out a case against the defendant. The will gives the estate to the widow, "for her own use and benefit or maintenance during her natural life," and at her death all of said property "not used for her maintenance" is given to another person.

The evidence shows that the defendant, with the assent of the widow, soon after the death of the deceased, sold the horse mentioned in the first paragraph, and four of the hogs mentioned in the second paragraph. A part of the proceeds was paid out on debts of the deceased, part for supplies for the widow, and the residue put out at interest for her use.

The inventory and appraisement, which are in evidence, show that the widow selected and took seven hundred and eighty-three dollars and thirty-five cents of personal property, besides some money which was left in her hands by the deceased, which she did not report to the executor or to the appraisers, amounting, as she says, to two or three hundred dollars. The widow had no right to sell the horse or the hogs, nor could the defendant derive any legal authority from her to do so. The fact that he made the sale under her direction and accounted to her for the proceeds, or applied them as she directed, is no justification.

Regarding Mrs. Prebster as a legatee under the will, she

could not take and dispose of the property, or authorize any one else to do so, without the assent of the executor. *Crist* v. *Crist*, 1 Ind. 570.

This property or the proceeds thereof, for aught that appears in the evidence, may have been necessary to pay the debts of the estate. All of the personal property, except what the law gave the widow, then five hundred dollars, was applicable, in the first place, to pay the debts, &c., of the deceased, and if not needed for that purpose, then it might go to the legatee. In 2 G. & H. 488, sec. 15, it is provided as follows: that "every person who shall unlawfully intermeddle with any of the property of a decedent, shall be chargeable as an executor of his own wrong, and shall be liable to an action in the court of common pleas, or any other court of competent jurisdiction, by any creditor or other person interested in the estate of the decedent, to the extent of the damages occasioned thereby, and shall account for the full value of such property, with ten per centum thereon, and may be examined under oath touching such intermeddling, and testimony thus elicited shall not be thereafter used against him in any prosecution; and such person may also be attached and imprisoned in the discretion of the court, until its orders in the premises are complied with; and no debt due such executor from the decedent, shall be deducted from the value of any such property."

The degree or extent of the intermeddling is not very material. A very slight circumstance of intermeddling with the goods of the deceased will make a person executor *de son tort*. It has been the policy of the law to discourage and prevent all improper interference with the property of the deceased. After the death of a person, there is unavoidably some lapse of time before a regular executor or administrator can be appointed and clothed with power to act, and it is during this time that acts of unwarrantable intermeddling generally take place. If the rule protecting estates from such acts were not enforced with reasonable strictness, great

confusion and injustice would result. In England, it has been adjudged that any of the following acts constitute the person an executor *de son tort:* taking a bible; taking a bedstead; killing the cattle of the deceased; using, selling, or giving away the goods of the deceased; taking the goods by one to satisfy his own debt or legacy; demanding the debts of the deceased, making acquittances therefor, or receiving the same; selling the goods of the deceased after his death by directions given before his death. 1 Williams Ex'rs, 225 and 226. In *Hawkins* v. *Johnson*, 4 Blackf. 21, it was held by this court, that the widow, by keeping the possession of the goods of her deceased husband, and using them as her own, rendered herself liable as executor *de son tort.*

In *Chandler* v. *Davidson*, 6 Blackf. 367, it was held that the circumstance alone that the widow remained in possession of part of the personal property after the death of her husband, did not make her liable as executor *de son tort;* and see, also, *Brown* v. *Benight*, 3 Blackf. 39. In *Brown's Adm'r* v. *Sullivan*, 22 Ind. 359, it was decided by this court that when one took possession of the property of the deceased, at the request of the widow of the deceased, merely for the purpose of taking care of it, and took proper care of it, doing it no injury, until letters of administration were taken out on the estate, and then delivered up the same to the administrator, he did not thereby render himself liable as an executor *de son tort.*

The fact that the defendant acted as the agent or servant of the widow, does not protect him from liability. It seems settled that in such case both may be liable. 1 Williams Ex'rs, 226 and 227, and note (1).

It seems that the executor, as well as a creditor, may sue an executor *de son tort.* 1 Williams Ex'rs., 232 and 242. And so we construe the statute above quoted.

It may be proper to say that an executor *de son tort* is entitled to be allowed for amounts paid by him to the proper

uses of the estate, as to the payment of debts, &c. *Reagan* v. *Long's Adm'x*, 21 Ind. 264.

But this can only be allowed where there are sufficient assets to pay all the debts of the deceased; for otherwise one creditor would be paid in full, and others nothing. If there be a deficiency of assets, he should be allowed only the proportionate share of the debts which he has paid.

In some of the states, it seems that a creditor cannot sue an executor *de son tort*, but the right of action is exclusively in the executor or administrator, and the amount recovered is distributed as other assets. Willard Ex'rs, 140. Under our statute the rule is different.

The judgment is reversed, with costs to the appellant.*

C. C. Nave, for appellant.

L. M. Campbell and *R. P. Parker*, for appellee.

*Petition for rehearing overruled.

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THE STATE *v.* LOCKE.

INDICTMENT.—*Ambiguity and Uncertainty.*—Where an indictment for obtaining a signature to a note by false pretenses charged that the pretenses were made to induce K. to become the security of the defendant on a six hundred dollar note, but the indictment showed that, instead of becoming a security, K. became a principal, and made a note for six hundred dollars payable to the defendant;

Held, that the indictment was bad for uncertainty and ambiguity.

APPEAL from the Wayne Criminal Circuit Court.

PETTIT, J.—This was an indictment for obtaining a signature to a note by false pretenses, under the statute, 2 G. & H. 445, sec. 27, which is as follows: "If any person, with intent to defraud another, shall designedly, by color of any false token or writing, or any false pretense, obtain the sig-

nature of any person to any written instrument, or obtain from any person any money, transfer, note, bond or receipt, or thing of value; such person shall, upon conviction thereof, be imprisoned in the state's prison not less than two nor more than seven years, and fined not exceeding double the value of the property so obtained."

A motion was made and sustained to quash the indictment, and the correctness of this ruling is the only question in the case. The indictment is as follows:

"STATE OF INDIANA, RANDOLPH COUNTY—In the Randolph Circuit Court, March term, 1869. The grand jurors for the State of Indiana, impanelled, charged, and sworn in the Randolph Circuit Court to inquire within and for the body of the same said county of Randolph, upon their oath do charge and present, that Isaac H. Locke, late of said county, at said county of Randolph, on the 27th day of September, A. D., 1868, for the purpose, and with the unlawful, felonious, and fraudulent intent of inducing, procuring, and obtaining one Thomas W. Kizer to sign a certain promissory note in writing, as security for said Isaac H. Locke in the sum of six hundred dollars, and with the felonious and fraudulent intent of cheating and defrauding the said Thomas W. Kizer, did unlawfully, feloniously, and falsely represent and pretend to the said Thomas W. Kizer, that he, the said Isaac H. Locke, was then and there the owner of a farm, in said county of Randolph, of great value, to wit, of the value of four thousand dollars; and that he, the said Isaac H. Locke, had then and there, on said farm, valuable stock, to wit, cattle, hogs, and sheep, of the value of six hundred dollars; and that he, the said Isaac H. Locke, had then and there in his possession, and of his own money, a large sum, to wit, six hundred dollars; and the said Thomas W. Kizer, then and there relying upon said statements, pretenses, and misrepresentations, and believing them to be true, did then and there sign and execute the said note; and the grand jurors aforesaid do charge and say, that by means of said false and fraudulent representations and

pretenses aforesaid, the said Isaac H. Locke did then and there, and thereby, unlawfully, feloniously, designedly, and fraudulently obtain the signature, name, and credit of the said Thomas W. Kizer to the certain written instrument and promissory note aforesaid, to wit, to a promissory note for the payment of money, to wit, six hundred dollars, to the said Isaac H. Locke, at the First National Bank of Winchester, which said note the said Isaac H. Locke negotiated at said bank and obtained the money thereon; and the grand jurors aforesaid charge that, in truth and in fact, the said Isaac H. Locke was not the owner of a farm in said county of Randolph, or elsewhere, of the value of four thousand dollars, or of any value, or had not then and there any stock, sheep, hogs, or cattle, of the value of six hundred dollars, nor had he then and there any sheep, hogs, or cattle of any value whatever, nor had he, the said Isaac H. Locke, then and there, the sum of six hundred dollars in money, or any money whatever, all of which the said Isaac H. Locke then and there well knew when he made the unlawful, felonious, and false and fraudulent statements and pretenses aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana."

This indictment is bad, and was properly quashed for uncertainty, if for no other reason. 2 G. & H. 402, sec. 55. "The indictment or information must be direct and certain, as it regards the party, and the offense charged." All the authorities, both elemental and adjudicated cases, concur that ambiguity and uncertainty is fatal to an indictment. *Walker* v. *The State*, 23 Ind. 61; *Commonwealth* v. *Magowan*, 1 Met. Ky. 368; *The People* v. *Gates*, 13 Wend. 311; *Whitney* v. *The State*, 10 Ind. 404; Bicknell's Cr. Pr. 90, 93, 94.

The indictment charges that the pretenses were made to induce Kizer to become the security of Locke on a six hundred dollar note, but that, instead of going security, he became a principal, and made a note for six hundred dollars, payable to Locke. This is ambiguity and uncertainty.

We are not satisfied that the pretenses are such as should deceive or mislead an ordinarily prudent man, nor that the note is sufficiently described; but we do not determine either of these points.

The judgment is affirmed.

B. W. Hanna, Attorney General, *D. M. Bradbury*, and *J. E. Neff*, for the State.

W. A. Peelle and *H. C. Fox*, for appellee.

THE STATE *v.* LOCKE.

APPEAL from the Wayne Criminal Circuit Court.

PETTIT, J.—The indictment in this case is, in all respects, the same as in the case of *The State* v. *Locke* at this term, *ante*, p. 419, and is affirmed on the authority of that case.

B. W. Hanna, Attorney General, *D. M. Bradbury*, and *J. E. Neff*, for the State.

W. A. Peelle and *H. C. Fox*, for appellee.

TURNBULL and Another *v.* ELLIS.

INTERLOCUTORY INJUNCTION.—*Appeal.*—*Affidavit.*—On an appeal from an interlocutory order of injunction, affidavits read on the hearing form no part of the record, and cannot be considered, unless preserved by a proper bill of exceptions.

APPEAL from the Elkhart Common Pleas.

DOWNEY, C. J.—Ellis, Turnbull, and Griffin entered into a contract of copartnership in the business of manufacturing

wagon materials and wood work generally, at the city of Goshen, for a term of five years from the 31st day of October, 1868.

On the 31st day of May, 1870, this action was brought by Ellis against Turnbull and Griffin. He alleges in his complaint, among other things, that Turnbull and Griffin have quit the business of said partnership; have made, and are making, arrangements to begin and prosecute, in the city of Laporte, Indiana, the same business which they are bound with the plaintiff to carry on in Goshen, intending to supply the trade and customers of the Goshen concern from the new manufactory at Laporte; that the defendants are the practical workmen of the firm, the plaintiff not being a mechanic, and not being able to carry on the business without their skill therein; that the defendants have secretly collected money of the firm, to the amount of four thousand six hundred dollars, which they have applied, or are about to apply, in the said business at Laporte, permitting the said firm at Goshen to be sued for an indebtedness which they should have paid with said money; that unless restrained, he is afraid the defendants will collect and apply to their own use other moneys of the firm; that the damage to him from the breaking up of said concern at Goshen, and the establishing of said business at Laporte, will be irreparable by any rule of law.

Prayer, that the defendants be enjoined from investing or engaging in said business at Laporte, or elsewhere than at Goshen in connection with plaintiff, during the term of said partnership, or until said firm shall have been lawfully dissolved, and from investing said money of said firm in such business; that they be enjoined from collecting the moneys, rights, &c., due said firm, or from mortgaging, pledging, or incumbering the same, or using the name, credit, or means of the firm, until they shall have accounted for and surrendered, for the use of the firm, all moneys collected by them, as well as moneys, claims, credits, and assets in their possession or under their control.

On this complaint, and affidavits in support of it and against it, the judge granted an injunction, by which the defendants were enjoined, until the next term of his court, and until the further order of the court, or of the judge, from in any manner meddling, interfering, or participating in the management of the business affairs of the firm, and from collecting or receiving any of the moneys, claims, or demands belonging or owing to said firm, from using the name or credit of the firm, from disposing of, selling, pledging, incumbering, mortgaging, or removing any of the property, goods, and chattels, credits or moneys of said firm, except with the consent of Ellis; and from using the money, means, or property of the firm, and any means raised by them, or either of them, by collecting or discounting the paper, bills, claims, or credits of said firm in the prosecution or aid of any other business than the business of said firm; and particularly from using or continuing to use the sum of four thousand six hundred dollars, or thereabouts, collected by them, as charged in the complaint, &c.; and from personally engaging or aiding in the prosecution of the business of the Laporte company, or any other occupation, business, or enterprise, except the business of said firm, until they shall have restored and surrendered said sum of four thousand six hundred dollars to the possession and proper use of said firm, or paid out the same upon the just debts of said firm, which they are authorized to do.

The defendants appealed from this interlocutory order, and have assigned for error the restraining the defendants from engaging in business at Laporte, and making the order enjoining them from personally engaging in or aiding in the prosecution of the business of the Laporte wheel company, or any other occupation, business, or enterprise, except the business of said firm of Turnbull, Griffin & Ellis, until they should have restored and surrendered said sum of four thousand six hundred dollars to the possession and proper use of said firm, or paid out the same upon the just debts of the said firm.

There is no bill of exceptions in the record showing upon what evidence the court acted in granting the injunction. The clerk has copied into the transcript several affidavits filed in his office, and the judge, in the order of injunction, says that affidavits were before him on the hearing, introduced by each party, but they are not set out in a bill of exceptions. There is nowhere any exception to the ruling of the court; nor was there, so far as we have been able to find, any objection made to the form of the order or judgment of the court. It is impossible for us to review the case upon a record thus made up.

The judgment is affirmed, with costs.*

J. B. Niles and *W. Niles*, for appellants.

W. A. Woods, for appellee.

* Petition for a rehearing overruled.

BURNHAM, Executor, and Another *v* LASSELLE, Executor.

PARTIES.—*Administrator.—Breach of Covenant of Seizin.*—A., having no title, the title and possession being all the time in C., sold and conveyed, by deed with full covenants, certain land to B., who afterwards died.

Held, that after the death of B., the right of action for the breach of the covenant of seizin was in his executor or administrator.

APPEAL from the Allen Common Pleas.

PETTIT, J.—We make this statement, that the question arising in this case may be fully understood: A. sold to B. a piece of land and made a deed for the same, with full covenants, that of seizin included, when A. had no title to convey, the title being in C., and he being in full and legal possession of all the land, having a perfect title to it. B. never had, nor had he any right to get possession of the land. Afterwards B. died, and his executor instituted a suit to recover damages for the breach of the covenant of seizin; and

the only question is, can the executor maintain the suit, or is it the right of the heir to do so?

The covenant of seizin was broken, and a right of action accrued for its breach to B., in his lifetime.

Our statute, 2 G. & H. 527, sec. 151, provides, that "every executor or administrator shall have full power to maintain any suit in any court of competent jurisdiction, in his name as such executor or administrator, for any demand of whatever nature due the decedent in his lifetime; for the recovery of the possession of any property of the estate; and for trespass, or waste, committed on the estate of the decedent in his lifetime."

Whatever the statute law may have been at the time the decision of *Martin* v. *Baker*, 5 Blackf. 232, was made, we think our present statute is decisive of the question; but we do not admit that the two cases are precisely alike; there, possession may have been given; in this case it was not; but if the two cases were the same, we would overrule that case. In this case, there was no land to run or descend to the heir, and consequently there was no covenant to run or descend to him. This cause or right of action survived and was properly brought by the executor. 2 G. & H. 330, sec. 783; *Bottorf* v. *Smith*, 7 Ind. 673; *The Junction R. R. Co.* v. *Sayers*, 28 Ind. 318; *Frink* v. *Bellis*, 33 Ind. 135; Rawle on Covenants is very full and clear on this question, pp. 336, 337, 608, and 609. *Smith* v. *Dodds*, at the present term, *post*, p. 452.

There are a large number of cases, both in England and America, referred to in the brief of the appellant, that fully sustain our views, but we do not deem it necessary to cite them.

We hold that in this, and all like cases, the executor or administrator has the right to bring and maintain the suit.

The judgment is reversed, with instructions to the court below to overrule the demurrer to the complaint, and for further proceedings.

WORDEN, J., having been of counsel, was absent.

J. Colerick, *J. Morris*, and *W. H. Wethers*, for appellants.

L. M. Ninde and *J. Brackenridge*, for appellee.

HAYS and Others v. MAY and Others.

NEW TRIAL, AS OF RIGHT.—In an action involving the title to real estate and the possession thereof, a new trial claimed as a matter of right, under section 601 of the code, must be granted within a year from the rendition of the judgment, or the court has no power to grant it.

APPEAL from the Ripley Circuit Court.

BUSKIRK, J.—The appellees instituted suit in the court below against the appellants for the recovery of forty acres of land in said county of Ripley; and on the 12th day of June, 1867, recovered judgment against appellants jointly for the land, and a separate judgment against appellant Hays for damages and costs, appellant Padgit being merely a tenant of Hays.

On the 7th of September, 1867, preparatory to moving for a new trial, under section 601 of the code, appellants applied to the clerk to know the amount of costs in said cause, and were told that the whole costs taxed up amounted to forty-one dollars and forty-one cents, which they then paid, and for which the clerk then gave a receipt purporting to be in full of all costs in said cause, but told appellants that a writ of possession was in the hands of the sheriff, and that he might have some fees upon it not included in said receipt; and afterwards, on the 10th of September, 1867, appellants applied to the sheriff, who represented that he had fees in said suit amounting to five dollars, which appellants thereupon paid, and took the sheriff's receipt in full of his fees on said writ. At the February term of said court, 1868, appellants filed their motion for a new trial under said section 601, alleging the payment of all costs and exhibiting said receipts, together with a copy of the judgment sought to be vacated. The court, at the term aforesaid, and without acting on appellant's motion ordered a special term to begin on the 19th day of May, 1868, for the hearing of said motion.

The bill of exceptions states, that on the 1st of June, 1868, being the 4th judicial day of said special term, appellants

submitted their said motion for a new trial upon oral evidence, in connection with said receipts respecting the payment of costs; and the court signifying that a new trial would be granted, the attorney of appellees interposed to inform said court that the costs in said cause had not been fully paid; whereupon said court declined to act definitely upon the motion, but gave further time to ascertain the facts as to the payment of costs and to determine whether or not a new trial should be granted.

The bill of exceptions further states that, on the 20th day of July, 1868, being the 9th judicial day of said special term, appellees filed their motion to reject the motion of appellants upon the grounds, first, that said costs had not been fully paid at the time the said motion of appellants was filed; and second, the year allowed within which a new trial might be granted had then expired; appellees, in their motion to reject appellants' motion for a new trial, stating that they appear specially for the purpose of contesting the jurisdiction of the court over the subject of said motion, and for no other purpose whatever; that the court, over the objection of appellants, "entertained said motion to reject," but gave leave to appellants to amend their motion so as to show the payment of all costs prior to the expiration of one year from the rendition of the judgment sought to be vacated, which amendment was accordingly made; and that thereupon appellants introduced said receipts, together with a further receipt for twelve dollars from the sheriff paid to him by appellants on the 10th of June, 1868, and being the final balance of all costs in said cause in which said new trial was asked.

The court sustained the motion of appellees to reject the motion of appellants, and overruled said motion of appellants for a new trial, to which appellants excepted. A bill of exceptions, purporting to contain all the evidence, was filed on the 29th of July, 1868, and an appeal prayed.

The refusal of the court to order a new trial as a matter of right is the only error assigned which we need determine. Counsel have discussed the questions in reference to the

payment of costs and the rejection of the motion for a new trial, but the conclusion to which we have come upon the main question renders it unnecessary for us to further notice these questions. The original judgment was rendered on the 12th day of June, 1867. The appellants, at the February term, 1868, filed their motion for a new trial. The motion was set down for a hearing at a special term to be holden on the 19th of May, 1868. The court overruled the motion. We have decided at the present term, in the case of *Ferger* v. *Wesler, ante*, p. 53, that not only the application for a new trial, under section 601 of the code, had to be made within one year from rendering the judgment, but the motion had to be acted on within the year. That ruling seems to be fully justified and required by the plain language of the section. We do not doubt that such construction will produce hardships in many instances. It is the province of the legislature to enact laws, and ours to construe them according to the well settled rules of construction; and if such laws operate prejudicially to the public interest, the remedy must be furnished by the law making power.

The judgment is affirmed, with costs.

J. R. Troxell, *J. W. Gordon*, and *S. M. Jones*, for appellants.

R. M. Goodwin and *L. Howland*, for appellees.

THE WESTERN UNION TELEGRAPH COMPANY *v.* BUCHANAN.

TELEGRAPH COMPANY.—*Rules Limiting Liability.*—A person sending a message by telegraph, who knows of the existence of certain rules and regulations adopted by the telegraph company touching the transmission of messages, though he does not use the blank of the telegraph company upon which the rules and regulations are printed, is as much bound by the rules and regulations as if he had written the message sent on such a blank prepared by the company.

SAME.—*Gross Negligence.*—Telegraph companies may, within certain limits, establish rules and regulations, which, in cases not depending on any statute, may govern the manner of sending messages, repeated messages, and insured messages; but they cannot make such rules and regulations as will protect them from liability for damages resulting from their own gross negligence, or the gross negligence of their agents and servants.

SAME.—A telegraph company having in her employment an operator who does not know of the existence of a town which is the county seat of a neighboring county, and on the line of the telegraph, is guilty of gross negligence.

SAME.—*Penal Statute.*—Where a statute fixes the amount which a telegraph company shall pay as a penalty if she fails to comply with its requirements, the company cannot change the degree or measure of her statutory liability by the adoption of rules and regulations.

SAME.—Paying back the amount paid for sending a dispatch, and the acceptance of the same, unless it is agreed to be accepted in full of all that the party has a right to recover by virtue of the provisions of a penal statute, will not bar an action for the full penalty.

SAME.—*Damages.*—In an action to recover the penalty given by statute for a failure on the part of a telegraph company to transmit a message, it is not necessary that the plaintiff should prove any damages.

APPEAL from the Fountain Circuit Court.

DOWNEY, C. J.—This was an action brought by the appellee against the appellant before the mayor of Attica. In his complaint he alleges, "that on the 23d day of September, 1869, he placed in the hands of the defendant's agent, at Attica, Indiana, the following message, to wit:

'ATTICA, Sept. 23, 1869.

'R. B. F. PIERCE, Lebanon, Boone Co., Indiana:

'When is the White case set for trial? Answer.

JAMES BUCHANAN.'

"That said message was left at said office during the usual business hours, and was to be transmitted to said Lebanon, Boone county, Indiana, without delay, the said plaintiff paying in advance for the transmission of said message, the sum demanded by the agent of said company at the time he delivered said message; that the defendant, without cause, wrongfully wholly failed and refused to transmit said message at all, to the damage of the plaintiff one hundred dollars, which has never been paid, either in whole or in part, as shown per exhibit 'A,' herewith filed and made part here-

of; and plaintiff prays that he have judgment for the statutory penalty in such case made and provided, in the sum of one hundred dollars, and other proper relief.

The exhibit filed with the complaint is as follows:

"1869. WESTERN UNION TELEGRAPH CO. DR.

"TO JAMES BUCHANAN:

"September 23.—To damages and penalty for not transmitting a message, $100."

The defendant answered, first, by a general denial; and, secondly, "that she has now, and has had ever since her organization as a company, certain proper rules and regulations governing and controlling her agents in their duties as employees for her in all transactions incidental to the transmission of messages, of which said rules and regulations plaintiff had full and complete knowledge at the time he pretended to deliver the message referred to in his complaint, a copy of which rules and regulations is filed with this answer; that plaintiff handed to the operator of said company the said message, at or near the Revere Hotel, in Attica, distant from her office one-fourth of a mile, requesting it forwarded; that plaintiff did not contract or pay for the services of said company to repeat the message, as by said company required, so as to avoid and secure against mistakes in the forwarding of his message. Said defendant avers, that said company did, in good faith and without delay, forward the said message, although the same was not delivered to the said company at her office at Attica, as required by law and the rules of her said office; that, by mistake, said message was sent to Lebanon, West, and did not reach Lebanon, Boone county, Indiana; that as soon as defendant ascertained that a mistake had occurred, she paid back and refunded to the plaintiff forty cents, being the amount paid by plaintiff at the time his said message was handed to defendant's operator on the street; that because no payment or contract was made by plaintiff to have said message repeated, said mistake occurred; wherefore," &c.

The regulations referred to in the answer are as follows: "All messages taken by this company are subject to the following terms: To guard against mistakes, the sender of a message should order it repeated; that is, telegraphed back to the original office. For repeating, one-half the regular rate is charged in addition. And it is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or for non-delivery of any unrepeated message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery or for non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruptions in the working of their lines, or for errors in cipher, or obscure messages. And this company is hereby made the agents of the sender, without liability, to forward any message over the lines of any other company, when necessary to reach its destination.

"Correctness in the transmission of messages, to any point in the lines of this company, can be insured by contract in writing, stating agreed amount of risk and payment of premium thereon, at the following rates in addition to the usual charges for repeating messages, to wit: one per cent. for any distance not exceeding one thousand miles, and two per cent. for any greater distance. No employee of the company is authorized to vary the foregoing. This company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message. WILLIAM ORTON, President.

"O. H. PALMER, Secretary.

"AARON SLAGER, General Superintendent,

"Chicaco, Illinois.

"Send the following message, subject to above terms, which are agreed to."

The cause was tried by the mayor, who rendered a judgment for the plaintiff for one hundred dollars.

The defendant appealed to the circuit court, where the cause was tried by the court, without a jury, with the same result. A motion for a new trial was made and overruled, the proper exception taken, and the evidence set out in the record.

As the evidence is short, we will state it. It is as follows:

James Buchanan testified: "I am the plaintiff. This message, set out in the complaint, was delivered to the operator, at Attica, during the usual business hours, on September 23d, 1869, and the charges demanded by the operator were paid at the time of such delivery. The message was written on the back of a business card, not on any of the company's blanks. The operator afterwards told me he did not know where Lebanon, Boone county, was, and had sent the message to West Lebanon, Warren county. I could get no answer to the same, and afterwards ascertained that it never had been sent to Lebanon, Boone county, Indiana, or delivered to Mr. Pierce. I was, at the time, aware of the rules and regulations pleaded by the defendant in her answer."

R. B. F. Pierce testified: "I was in Lebanon, Boone county, at the time the message should have been sent. I never received it. The defendant has a line running from Attica to Lebanon, Boone county, Indiana."

This was the plaintiff's evidence. The defendant gave in evidence the rules of the company, as above set out.

J. M. Lee testified: "I was the operator at Attica when the dispatch was delivered. It was not sent to Lebanon, Boone county, but I sent it to West Lebanon, Warren county. I did not know of the other place at the time. No request was made that it be repeated, and no fee for repeating the same was paid or demanded at the time. The message was not written on a company blank, but on the back of a business card. I gave back the money paid me for sending said message."

This was all the evidence given in the cause.

The statute which gives the penalty sued for in this case is in 1 G. & H., 611, sec. 1, and is as follows:

"Section 1. Be it enacted by the General Assembly of the State of Indiana, that every electric telegraph company, with a line of wires wholly or partly in this State, and engaged in telegraphing for the public, shall, during the usual office hours, receive dispatches, whether from other telegraphic lines or from individuals; and, on payment or tender of the usual charge, according to the regulations of such company, shall transmit the same with impartiality and good faith, and in the order of time in which they are received, under penalty, in case of failure to transmit, or if postponed out of such order, of one hundred dollars, to be recovered by the person whose dispatch is neglected or postponed: Provided, however, that arrangement may be made with the publishers of newspapers for the transmission of intelligence of general and public interest, out of its order, and that communications for and from officers of justice shall take precedence of all others."

The first position taken by the appellant is, that the company is not liable because the appellee did not pay for, and cause the message to be repeated, according to the regulations of the company. The company concedes its liability to the extent of the money paid by the appellee for sending the message, but insists that she is not liable beyond that amount; that the appellee, if he intended to hold the company for any greater amount than the sum paid, should have paid sixty, instead of forty cents, and had the message repeated, that is, returned to the office from which it was sent, and thus proved that it had been correctly sent. It is insisted that as the appellee, according to his own testimony, had notice of the regulation of the company, he was bound by it as much as if it had been incorporated into the contract.

It is clear that the appellee had notice of the existence of the regulations of the company. He testified to this fact in his own evidence. It would seem that the intention of the

company was that the party sending a message should write it on the same paper on which the regulation was printed, and under the same, and thereby expressly agree that the message was received and to be sent under, and in accordance with, such regulation. In this case, however, the message was not written under such regulation, but was written on a business card, and handed to the operator or agent of the company, when he was absent from the office. We are inclined to hold, however, that as the appellee knew of the existence of the regulations, and as the regulations themselves provided that no employee of the company was authorized to vary the terms of them, the appellee was as much bound by them as if he had written the message on the paper prepared by the company, and had thus assented to them.

The cases against telegraph companies will be found to range themselves under three different heads; first, such as are brought to recover damages for the breach of contract, express or implied, relating to the sending and delivery of messages; second, such as are brought to recover a penalty, or enforce a liability to pay damages imposed by statute; and third, such as are brought to subject the company or its agents to criminal responsibility for acts done or omitted, in violation of some statute.

This action falls under the second division, and is properly brought to recover the penalty given by the section of our statute which we have already set out in this opinion. It is not pretended that the appellee sustained damages to the amount mentioned in the *ad damnum* of the complaint, and for which judgment was rendered. In fact, it is not shown that the appellee suffered any damage from the omission or failure to send the dispatch.

The company in its regulations, which we have copied, provides for three rates of charges for sending dispatches, and fixes, or attempts to fix, as many different rules with reference to the measure of damages which may be recovered against it, in case of violation of the contract.

First, where the ordinary fee or charge is paid, and the message is not to be repeated, as in this case, and where, if the regulation is to govern, the company is only liable to refund to the party sending the message the sum paid by him for sending it.

Second, where the party sending the message contracts for having it repeated, and pays one-half in addition to the usual charge for that service; in which case the company is liable to pay damages not exceeding fifty times the amount paid by the party for sending the message.

Third, where the company, by contract in writing, insures the correct transmission of the message, the amount of the risk being agreed upon by the parties, and payment made according to the specified rates; in which case the company will be liable for the amount of the risk as fixed by the agreement.

If the regulation of the company in question was reasonable, and such as the company might make, and was therefore valid, we think it protected the company from liability to any greater extent than the amount paid.

The language of the regulation is, "And it is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or for non-delivery of any unrepeated message beyond the amount received for sending the same."

We think the question upon which the case depends is whether or not this was such a regulation as the company might lawfully make under the statute in question.

In *The Western Union Telegraph Company* v. *Ward*, 23 Ind. 377, this court held that the penalty might be recovered by a party whose dispatch was not sent as soon as it should have been; but no regulation of the company, such as is disclosed in this case, was brought to the attention or notice of the court.

In *Thurn* v. *The Alta Telegraph Company*, 15 Cal. 472, the action was founded upon a statute similar in most

respects to ours, the penalty being five hundred dollars, while ours is one hundred dollars. It was there held that the statute was a penal one, and should, therefore, be strictly construed. The case was decided in favor of the company because the plaintiff was not shown to be the party entitled to sue for the penalty.

In *MacAndrew* v. *The Electric Telegraph Company* 17 C. B. 3, the plaintiff sent his telegram, subject to a condition somewhat similar to that in the case at bar, by which the company charged half the usual price, in addition, for repeating, and stated that they would not be responsible for mistakes in the transmission of unrepeated messages from whatever cause they might arise. The message was not repeated. The regulation was in the form of a notice, and was brought home to the plaintiff. A mistake was made in sending the message, by which the plaintiff's ship was sent to one port instead of another, and he sustained a loss on the cargo. The English statute required the company, subject to such reasonable regulations as might be from time to time made or entered into by the company, to send and receive messages by all persons alike, without favor or preference. The regulation was held to be reasonable, so far as it required messages to be repeated, and provided that the company would not be responsible for mistakes in unrepeated messages from whatever cause they might arise. It was held to be reasonable, as the public had an opportunity to transmit unimportant messages for a small charge, and might secure accuracy in an important message at a moderate additional expense. The company was held not liable.

In *Camp* v. *The Western Union Telegraph Company*, 1 Met. Ky. 164, it was held that such a regulation was reasonable and just, and such as the company had a right to prescribe as the price of its responsibility; and a party acting under the notice, who did not have his message repeated, would be regarded as sending the same at his own risk, and the company would not be liable for damages resulting from a mistake not occasioned by negligence or the want of skill of

the agents of the company. The plaintiff having sent a message without having it repeated, it was held that the company was not liable to him for a mistake in its transmission, whereby he lost one hundred dollars.

In *Wann* v. *The Western Union Telegraph Company*, 37 Mo. 472, it was held that whether telegraph companies be regarded as common carriers or bailees, they may limit their liabilities by such a regulation, subject to the qualification that they will not be protected from the consequences of gross negligence. "Deny them this right, and they will be utterly unable to protect themselves against the hazards and risks which are incident to the business in which they are engaged. We see nothing unreasonable in their declaring that they will not be responsible for unrepeated messages. The system of telegraphing, however perfect it may be, is seriously affected by atmospheric causes, which are uncontrollable; and if a man wants to send a message of an important character, prudence and wisdom would seem to dictate that he should have it repeated, in order to be assured of its correct transmission. And as the repetition imposes additional labor, it is surely justice that an enhanced price should be paid. If the company undertakes to insure the accuracy of the message and assumes additional risk, it should be paid accordingly. The message sent by the plaintiff was one of importance; he could have demonstrated its perfect correctness by having it repeated at a trifling sum, and he was fully cognizant of the regulations of the company."

In *Ellis* v. *The American Telegraph Company*, 13 Allen, 226, the subject is fully and ably examined. The court, among other things, say: "There can be no doubt that, in the ordinary employments and occupations of life, men are bound to the use of due and reasonable care, and are liable for the consequences of carelessness or negligence in the conduct of their business to those sustaining loss or damage thereby. We can see no reason why this rule is not applicable to the business of transmitting messages by tele-

graph. But the rule does not operate so as to prevent parties from prescribing reasonable rules and regulations for the management of their business, or establishing special stipulations for the performance of services, which, if made known to those with whom they deal, and directly or by implication assented to by them, will operate to abridge their general liability at common law, and to protect them from being held responsible for unusual or peculiar hazards which are incident to particular kinds of business. Of course, a party cannot, in such way, protect himself against the consequences of his own fraud or gross negligence, or the fraud or gross negligence of his servants or agents. Nor can he escape all liability or responsibility in the performance of the service or duty which he undertakes. But he may, to a certain extent, in the mode above indicated, limit the extent of his liability, or graduate the amount of his compensation according to the risk which he assumes, as well as by the nature of the service which he renders. It is upon this ground that it is held that a common carrier, although by the rules of law he is an insurer of the property intrusted to him, may regulate the extent of his liability by a notice, brought home to his employer and assented to by him either directly or by implication. This principle is especially applicable to an employment such as is carried on by the defendants, which is, in its nature, a public one, and which the party undertaking it is bound to exercise for every one who may seek his services, however onerous or hazardous may be the particular duty or labor which he is called on to perform."

See, also, *The Western Union Telegraph Company* v. *Carew*, 15 Mich. 525, where the same doctrines are laid down.

In *Birney* v. *The New York and Washington Printing Telegraph Company*, 18 Md. 341, it was held that the company was not a common carrier, but a bailee. It was also held, that the company was liable for not sending a dispatch, though there existed such a regulation of the company, and though the message was not repeated.

In *Parks* v. *The Alta California Telegraph Company*, 13 Cal. 422, it is decided that telegraph companies are common carriers. The rules of law which govern the liabilities of telegraph companies are not new. They are old rules applied to new circumstances. Such companies hold themselves out to the public as engaged in a particular branch of business, in which the interests of the public are deeply concerned. They propose to do a certain service for a given price. There is no difference in the carrying of a message along a wire, and carrying goods or a package along a route, &c. In this case, the plaintiff was advised of the failure of parties who were indebted to him, and answered ordering an attachment. The return message was not sent, on account of an accident, until the next day, of which the plaintiff was not notified, and when the message reached its destination other attachments had been issued and had gained a priority. The company was held liable for the amount of the debt.

In *The New York and Washington Printing Telegraph Company* v. *Dryburg*, 35 Pa. St. 298, which was an action by the receiver of a message, it was held that the company was liable for the misfeasance of its agent in sending a different message from that directed to be sent. That though not insurers of the safe delivery of what is intrusted to them, their obligations, like those of common carriers, spring from the public nature of their employment and the contract under which the particular duty is assumed. That if they negligently or wilfully violate their duty to send the very message prescribed, they are responsible to the party to whom the erroneous message is addressed, in an action on the case. That even if the telegraph company be considered only as the agent of the sender of the message, they are liable to third persons, as wrongdoers for any misfeasance in the execution of the duties confided to them. They are not excused from liability to third persons for damages sustained by the negligent transmission of an erroneous message, by the fact that the sender did not pay for its being repeated back, in accordance with a rule of the company, whereby

they limited their responsibility to the correct transmission of messages that should be repeated back; especially where the mistake consisted in transmitting a different message from the one ordered.

While these authorities establish the proposition that telegraph companies may, within certain limits, establish rules and regulations which, in cases not depending on any statute, may govern the manner of sending messages, and the prices to be paid for messages, repeated messages, and insured messages, they also establish the proposition that such companies cannot make such rules and regulations as will protect them from liability for damages resulting from their own gross negligence, or the gross negligence of their agents and servants.

In the case under consideration, we cannot regard the acts of the agent of the company as anything but the result of gross negligence, or incompetency. That the agent of a company should not know of the existence of a town which is the county seat of a neighboring county, the town being one of the stations on the line of the company, shows his utter unfitness for the position. The agent himself testifies, "I sent it" (the dispatch) "to West Lebanon, Warren county. I did not know of the other place at the time." We think the company was guilty of gross negligence in employing such an operator.

But this case may not turn on the question of gross negligence alone. The action is founded on a statute, a penal statute, and the object is the recovery of a penalty. We recognize the familiar rule that penal statutes are to be construed strictly. The statute fixes the amount which the company shall pay, as a penalty, if it fail to comply with its requirements; that is, it shall pay one hundred dollars to the party aggrieved. The regulation of the company attempts to fix another rule of liability; that is, that the company shall refund to the sender of the dispatch the amount paid by him for sending it, in case of an unrepeated message, and not exceeding fifty times the amount paid in

case of a repeated dispatch. We think the company cannot thus change the degree or measure of her statutory liability by the adoption of rules and regulations.

But it is claimed that, as the company refunded to the appellee the amount paid by him for sending the dispatch, and he accepted the same, he is thereby prevented from recovering anything more. We cannot agree to this. There is nothing to show that he accepted the return of the forty cents in full of all that he had a right to recover. Without such an agreement, we think the payment of that amount was not a discharge of the cause of action.

It was not necessary, to make out the plaintiff's right of action to recover the penalty, that he should have proved any damage.

The judgment is affirmed, with costs.

J. E. McDonald, *J. M. Butler*, and *E. M. McDonald*, for appellant.

J. Buchanan, for appellee.

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MURPHY and Others *v.* HENRY and Others.

DESCENTS.—*Construction of Statute.—Widow.—Child.—Collateral Relatives.*—A., being seized of lands, died intestate, leaving B., his widow, and C., his only child, him surviving; afterwards, B. died, intestate, leaving said C., her only child, her surviving; afterwards, C. died, intestate, without issue, grandfather or grandmother, brother or sister, but with paternal and maternal uncles and aunts him surviving.

Held, that the widow, B., and C., the child of A., deceased, inherited, each one half, as tenants in common in fee simple, the lands of which A. died seized; that upon the death of B. (the widow of A. and mother of C.) C. inherited from B. immediately and directly, and not through her from A., the said one half of the lands descended to her from A.; that C. was thereupon seized in fee of the entirety of the lands, and at his death they descended, the one-half he had inherited of his father A. to the paternal uncles and aunts of C., and the one-half he had inherited from his mother B. to his maternal uncles and aunts.

SAME.—The doctrine of tracing back the title to a remote ancestor, the first purchaser, does not apply to our statute of descents. The rule is to trace the title back to the person last seized.

SAME.—The term "ancestor" as used in a statute of descents means any one from whom the estate is immediately inherited.

Johnson v. *Lybrook*, 16 Ind. 473, overruled.

APPEAL from the Martin Common Pleas.

BUSKIRK, J.—The appellants commenced in the court below a proceeding against the appellees for the partition of certain real estate.

The facts necessary to a proper understanding of the question involved are these: that Macon Henry, Sr., departed this life, intestate, and seized of the land in controversy; that he left to survive him his widow, Sarah Henry, and Macon Henry, Jr., who was his only child; that afterwards Sarah Henry departed this life, intestate, and left surviving her Macon Henry, Jr., who was her only child; that afterwards, Macon Henry, Jr., departed this life, intestate, and without issue, and seized of the entirety of said lands; that the said decedent, at the time of his death, had no grandfather or grandmother, and no brother or sister, or their descendants; that he left surviving him collateral relatives on both the paternal and maternal sides; that the plaintiffs were the maternal uncles and aunts of the decedent; and that the defendants were his paternal uncles and aunts and the descendants of such as were dead.

The prayer of the petition was, that the land should be equally divided between the paternal and maternal relatives. The appellees demurred to the petition, and the demurrer was sustained, and the appellants excepted. The appellants having refused to amend, final judgment was rendered for the appellees. The appellants assign for error the sustaining of the demurrer to the petition.

The question presented for our decision is one of great importance, and has received careful and mature consideration. The real question is, to whom the land in controversy descended upon the death of Macon Henry, Jr. The appellants claim that one-half of it goes to the relatives of

Mrs. Sarah Henry, the surviving wife of Macon Henry, Sr., and the mother of Macon Henry, Jr. The appellees insist that the whole of the land goes to the paternal relatives of Macon Henry, Jr. The solution of the question will depend upon the interpretation and construction to be given to our statute of descents.

It is agreed, by the parties, that Macon Henry, Sr., died intestate, seized in fee simple of the land in dispute; and that he left a surviving wife and one child, the decedent. The descent of this land is governed by our statute, and not by the common law. Section 23 of our statute of descents reads thus: "If a husband die intestate, leaving a widow and one child only, his real estate shall descend, one-half to his widow and one-half to his child." 1 G. & H. 295.

By other sections of the statute, the widow inherits from her husband one-third, one fourth, and one-fifth, the amount depending upon the number of children and the value of the estate. Macon Henry, Sr., while in life, was the absolute owner in fee simple of the entirety of the land; but our statute of descents, at the instant of his death, severs the estate and casts the inheritance, one-half on his widow and one-half on his only child. Subsequent to his death, the land was held by his widow and his son as tenants in common. It might have been divided, and then they would have held it in severalty. Upon the death of the widow, the first section of the statute of descents cast the descent upon the decedent, who was her only child, and he thereby became the absolute owner in fee simple of the entirety of the land. If he had been of sufficient age, he could, by will or deed, have passed a perfect and absolute title in fee simple. If he had died intestate, and with issue, it would have descended to his children. But he died in infancy, intestate, and without any kindred in either the ascending or descending line, but leaving collateral relatives on both the paternal and maternal sides. The question which we have to decide is, to whom did the land go upon the death of the decedent. The paternal relatives claim that, inasmuch as one-half of

the land descended immediately to the decedent from his father, and the other half remotely, but through his widow, descended from the father to the son, the entire estate, upon the death of the son, goes to them; and they refer to and rely upon the first clause of section 5 of the statute of descents. The clause referred to reads thus: "If the inheritance came to the intestate by gift, devise, or descent, from the paternal line, it shall go to the paternal grandfather and grandmother, as joint tenants, and to the survivor of them; if neither of them be living, it shall go to the uncles and aunts in the paternal line, and their descendants, if any of them be dead, and if no such relatives be living, it shall go to the next of kin in equal degree of consanguinity, among the paternal kindred; and if there be none of the paternal kindred entitled to take the inheritance as above prescribed, it shall go to the maternal kindred in the same order." 1 G. & H. 292.

The appellants claim that Sarah Henry became, by inheritance from her husband, the absolute owner in fee of the one-half of said land; and that upon her death, the decedent inherited directly from her one-half of said land; and that under the second clause of said section, the portion that the decedent inherited from his mother goes to them as the maternal relatives of the deceased.

The second clause of said section reads thus: "If the inheritance came to the intestate by gift, devise, or descent, from the maternal line, it shall go to the maternal kindred in the same order; and if there be none of the maternal kindred entitled to take the inheritance, it shall go to the paternal kindred in the same order."

The real questions presented for our decision are, did the decedent inherit the entire tract of land from his father? or did he inherit one-half from his father and the other half from his mother? The decision of these questions will depend upon the nature and character of the estate which Mrs. Henry inherited from her husband. If she held the property, thus inherited, in fee, and was the absolute owner

thereof, then the inheritance of one-half of the land came to the decedent by descent from her. If she had only a life estate in the lands of her husband, then such estate would terminate with her death, and the entire inheritance came to the decedent from his father. Whatever portion the decedent inherited from his mother, upon his death went to her kindred; and whatever he inherited from his father, upon the death of the decedent went to his father's kindred.

The common law canons of descent have been overturned in this State by our statute of descents, and in determining the nature and character of the estate which Mrs. Henry inherited from her husband, we must look to the language of the statute and the decisions of this court. Section 17 reads: "If a husband die testate, or intestate, leaving a widow, one-third of his real estate shall descend to her in fee simple, free from all demands of creditors," &c.

Section 27 reads thus: "A surviving wife is entitled, except as in section 17 excepted, to one-third of all the real estate of which her husband may have been seized in fee simple, at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law; and also of all lands in which her husband had an equitable interest at the time of his death," &c.

The court has, in numerous cases, held, that a surviving wife holds in fee simple the lands which descend to her from her husband. We refer to the following cases in support of this position: *Philpot* v. *Webb*, 20 Ind. 509; *Newby* v. *Hinshaw*, 22 Ind. 334; *Smith* v. *Smith*, 23 Ind. 202; *McMakin* v. *Michaels*, 23 Ind. 462; *Goodrich* v. *Myers*, 25 Ind. 10; *Jackson* v. *Finch*, 27 Ind. 316; *Leard* v. *Leard*, 30 Ind. 171; *Gaylord* v. *Dodge*, 31 Ind. 41.

This court, in the case of *Smith* v. *Smith*, *supra*, say: "It is conceded in argument, as we understand, that on the death of the husband, the widow took one-third of the land in fee simple, and each of these parties also one-third. The statute, at any rate, establishes that proposition. 1 G. & H. 294, sec. 17. The question then is, who inherits the

widow's third upon her death, she leaving a child of her own (the appellee) and another child of the same father by his previous marriage (the appellant) surviving her.

"It seems to us clear that, in this case, the lands of the widow descend to her own child. Here the widow is the ancestor, and there is no fair construction of our statute of descents which will cast any portion of the estate upon those not of her blood. The sixth section of the act is relied upon, which is, that 'kindred of the half blood shall inherit equally with those of the whole blood; but if the estate shall have come to the intestate, by gift, devise, or descent, from any ancestor, those only who are of the blood of such ancestor shall inherit.' But the kindred spoken of in this section must be kindred of the person last seized; in this case, of the second wife."

This court, in the case of *McMakin* v. *Michaels*, *supra*, say: "A widow inherits in fee, subject only to such qualifications as are prescribed by the statute of descents. Sections 18 and 24 contain such qualifications, but aside from these we know of no other provision which in any way modifies the rule of descent, that the real and personal property of any person dying intestate shall descend to his or her children in equal proportions."

The proviso to section 24 is in these words: "Provided, that if a man marry a second or other subsequent wife, and has by her no children, but has children alive by a previous wife, the land, which at his death descends to such wife, shall at her death descend to his children." See *Dean* v. *Lyon*, 8 Ind. 71; *Martindale* v. *Martindale*, 10 Ind. 566; *Ogle* v. *Stoops*, 11 Ind. 380.

This court, in the case of *Goodrich* v. *Myers*, *supra*, say: "It was held by this court, in the case of *Philpot* v. *Webb*, 20 Ind. 509, that one-third of the real estate of her first husband, W., descended to the widow in fee; that her subsequent marriage did not divest it; and that at her death it descended to her heirs, and was liable to be sold for debts contracted by her. If this is good law it settles the case

in judgment; for if the 18th section is a rule of descent, and not a limitation of the estate of the widow in the lands of her deceased husband, then it follows that the children of Myers had no vested interest in the portion of their mother, in the lands of which their father died seized. All the interest they can have must come to them as heirs of the mother."

This court, in the case of *Gaylord* v. *Dodge*, *supra*, say: "Tenancies in dower, having been abolished by statute, no longer exist in this State. The rights of a surviving wife in the real estate of her husband are those created by statute alone, and hence the question presented here must be determined by reference to the provisions of the statute on that subject."

The above sections of our statute of descents and decisions of this court conclusively demonstrate that the surviving wife of Macon Henry, Sr., was the absolute owner in fee simple of one-half of the lands of which her husband died seized; that she possessed the power to devise or convey the same, and could have thereby passed a perfect and absolute title in fee; that it was subject to sale for the payment of her debts; that upon her death it descended to her son, the decedent.

The second clause of section 5 is, "If the inheritance came to the intestate by gift, devise, or descent, from the maternal line, it shall go to the maternal kindred in the same order."

Did one-half of the land in controversy come to the intestate by descent from his mother? The father of the intestate was seized in fee of the lands up to his death. The statute of descents, upon his death, cast the descent upon his widow and child. We have shown that a fee simple title was vested in her by our statute. The intestate could not inherit the one-half from his father, for he had been divested of all title. Then he must have inherited it from his mother, in whom the fee had vested and remained vested until her death, when the statute cast the descent from her to him. The language of the statute is, "if the inheritance

came to the intestate from the maternal line," and not through the maternal line, as has been earnestly argued.

It has been insisted, in argument, that as the father was the first purchaser, the title can be traced back from the intestate, through his mother, to his father; and in support of this position the case of *Johnson* v. *Lybrook*, 16 Ind. 473, has been pressed upon our consideration. We have examined that case with great care. The facts upon which the ruling in that case was made are these: "That William Freeman died in 1857, seized of certain lands, and left to survive him Ann Freeman, his widow and heir, and Julia and Susan Freeman, his children by his said wife; that in 1859, Julia died intestate, and without issue; that afterwards, in the same year, Ann, the widow, died intestate; that afterwards in the same year, Susan died intestate and without issue, immediate or remote, and leaving no brothers or sisters, nor grandparents on either the paternal or maternal side; but leaving uncles and aunts on both the paternal and maternal side." Upon the above facts, this court held that the estate went to the paternal relatives; and after quoting the fifth section of our statute of descents, the court say: "It appears to have been the intention of the framers of our statute of descents, that when a decedent leaves no heirs in the descending line capable of inheriting, and the property has to be distributed to collaterals in the ascending line, those who are of the blood of the first purchaser shall be preferred, in the instances named in the statute. It is important, then, to determine in what character, and by what right, Ann, the widow, was entitled to a part of said lands. By the 17th and and 24th sections of said statute, the portion that she is so entitled to is spoken of as that which descends to her from her husband. Incidentally, it has been by this court recognized as the proper construction of the statute in question (13 Ind. 508), that she takes as heir. If she received, then, by descent, and not because of any marital rights which might be supposed to exist, separate from such right of

descent, the title could be traced back through her to the paternal line of the immediate decedent."

The above case is analogous to the one under consideration, and if the decision there made is adhered to, it is decisive of this case. In our judgment, the above decision cannot be sustained, either on principle or by authority. When that decision was made, it was generally supposed that a surviving wife took but a life estate in the lands of her husband. The doctrine of tracing back the title to a remote ancestor does not apply to our statute of descents. In determining from whom an estate came, the rule is, to trace the title back to the person last seized. It is the immediate, and not the remote, ancestor from whom the descent comes. This court, in the case of *Smith* v. *Smith, supra,* in speaking of the descent of lands, that the widow had inherited from her husband, to her child, held that the widow was the ancestor, and that no fair construction of our statute of descents would cast any portion of the estate upon those who were not of her blood. This decision is abundantly supported by authority.

Washburn, in his work on Real Property, vol. 3, p. 18, sec. 39, says: "The term 'ancestor,' as used in a statute of descents, means any one from whom the estate is inherited. In this sense, an infant brother may be ancestor of an adult brother, the former having died, and his estate having come to the latter as his heir."

The Supreme Court of Ohio, in the case of *Lessee of Prickett* v. *Parker,* 3 Ohio St. 394, say: "It thus appears that the ancestor meant by our statute is any one from whom the estate is inheritable, and that the ancestor from whom it must, in law, be understood to 'have come to the intestate,' is he from whom it was immediately inherited."

Judge STORY, in delivering the opinion of the Supreme Court, in the case of *Gardner* v. *Collins,* 2 Pet. 58, says: "As to descents, as well as gifts and devises from a parent, it is plain that the act looks only to the immediate descent or title. A descent from a parent to a child cannot be con-

strued to mean a descent through, and not from, a parent. So a gift or devise from a parent must be construed to mean a gift or devise by the act of that parent, and not by that of some other ancestor more remote passing through the parent."

The same learned judge, on page 91, says: "It is true that, in a sense, an estate may be said to come by descent from a remote ancestor to a person upon whom it has devolved through many intermediate descents. But this, if not loose language, is not that sense which is ordinarily annexed to the term. When an estate is said to have descended from A. to B., the natural and obvious meaning of the words is, that it is an immediate descent from A. to B. If other words of a statute should seem to require another and more enlarged meaning, there would be no absolute impropriety in adopting it; but if the true sense is to be sought from the very terms *per se*, that which is the usual sense would seem most proper to be followed. It is not for courts of justice to indulge in any latitude of construction where the words do not naturally justify it, and there is no express legislative intent to guide them."

The above authorities are directly in point, and are entitled to great weight and consideration. They establish the proposition that the title cannot be traced back from the intestate through his mother to his father. It is our duty to construe our statute to mean an immediate and not a remote descent, an immediate and not a remote inheritance. The descent must be not only immediate, but direct, and not remote and intermediate. The plain reading of our statute, the decisions of this court, and the authorities above quoted, conclusively demonstrate that the ruling in the case of *Johnson* v. *Lybrook*, *supra*, is not correct. That decision has been overruled in principle by the previous decisions of this court, and we now, in express terms, overrule it.

Our statute of descents severed the estate upon the death of Macon Henry, Sr., and cast the descent of one-half of it on the intestate, and the other half upon his widow, who

became the absolute owner in fee, and upon her death it descended directly and immediately from her to the intestate. We hold that the intestate inherited one-half of the lands in controversy from his father, and the other half from his mother; and that upon his death one-half of the same went to his paternal relatives, and the other half to his maternal relatives. The court erred in sustaining the demurrer to the petition.

The judgment is reversed, with costs, and the cause is remanded, with directions to the court below to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

S. W. Short, for appellants.

C. S. Dobbins and *C. H. McCarty*, for appellees.

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SMITH and Wife *v.* DODDS and Another, Administrators.

LANDLORD AND TENANT.—*Entry by Landlord.—Administrator.*—Suit by the administrator of a deceased tenant against the landlord, for forcible entry upon the death of the tenant, and taking possession of the leased property, during the continuance of the term, and converting crops growing on the premises.

Held, that the administrator was the proper party to bring the action in the court of common pleas.

JUDGMENT.—*Form of.*—A defendant, being a *feme sole*, married during the pendency of the suit, and her husband was then made a party defendant, and personal judgment was taken against both, without exception, and without motion after judgment to correct or vacate.

Held, that no question could be raised in the Supreme Court as to the form of the judgment.

SAME.—*Motion in Arrest.*—A motion in arrest does not raise any question as to the form of the judgment.

APPEAL from the Cass Common Pleas.

BUSKIRK, J.—This is a suit brought by the appellees, as administrators of the estate of David Swinehart, deceased,

against the appellants, Mary A. Smith and Anthony F. Smith. It was originally brought against Mary Ann Heth, but during the pendency of the suit she intermarried with Anthony F. Smith, who was made a party.

David Swinehart, in his lifetime, leased of the appellant, Mrs. Smith, and her former husband, Harvey Heth, for the term of three years, a farm adjoining the city of Logansport. The terms and conditions of the leasehold are specified in the lease, a copy of which is made a part of the complaint. The property was the separate property of Mrs. Smith. Swinehart took possession, under the lease, in the spring of 1865, and died in the fall of the same year, while two full years of the lease were unexpired, and leaving, as the fruits of his season's labor, celery, parsnips, wheat, and barley in the ground, and much labor expended in preparing the soil for the coming spring. After his decease, Mary Ann Heth, whose husband, Harvey Heth, had died some time previous, entered the premises by force, dispossessed the administrators, converted to her own use the vegetables and grain found thereupon, a share of which, by the conditions of the lease, belonged to the estate, and retained possession of the premises for the balance of the unexpired term, without the consent of the administrators. The administrators waited until the lease had expired, and then brought suit against her for the value of the property converted.

There was a demurrer to the complaint, which was overruled, and an exception was taken. The appellants answered in two paragraphs. There was a demurrer to the second paragraph of the answer, which was overruled, and an exception was taken; but there being no assignment of cross errors, it will not be necessary to further notice the answer. The cause was tried by a jury, resulting in a verdict for the plaintiffs in the sum of two hundred and fifty dollars. There were motions for a new trial and in arrest of judgment made and overruled, to which rulings proper exceptions were taken. The evidence is not in the record.

Two causes are assigned by the appellants why the judgment should be reversed: 1. The complaint does not state facts sufficient to constitute a cause of action. 2. The court had no jurisdiction of the cause.

The first question is raised by the action of the court in overruling the demurrer to the complaint, and the second by overruling the motion in arrest of judgment.

The appellants insist that the administrators of the estate of David Swinehart, deceased, do not possess the legal capacity to institute and maintain this action. We think otherwise. The administrator has no authority to deal with the real estate. His powers are limited to the personal property, which is vested in him from the time the letters of administration are issued, and his authority will therein date back to the death of the decedent. *Valentine* v. *Jackson*, 9 Wend. 302; *Babcock* v. *Booth*, 2 Hill, 181. And he can maintain an action for any injury done the personal estate after the intestate's death. *Rockwell* v. *Saunders*, 19 Barb. 473.

We cite the following from 1 Williams on Executors, 784: "Upon the death of the testator or intestate, if any injury is afterwards done to his goods and chattels, the executor or administrator may bring an action in damages for the tort. * * * For it is a rule of law, that the property of personal chattels draws to it the possession, so that the owner may bring either trespass or trover, at his election, against any stranger who takes them away."

The law, then, gives to the administrator the possession of the personal property, and it is a well settled rule of law, that a mere naked possession is sufficient, as against a wrongdoer. The possession of the intestate is the possession of his representative, and that possession dates back, by operation of law, to the death of the former; and hence any injury that may be done to the personal estate subsequent to his death, and previous to the appointment of the administrator, creates an action in favor of the latter. He may even maintain an action for trespass committed on the real estate, or

for taking and carrying away the goods of his intestate in his lifetime. *Rockwell* v. *Saunders, supra.*

If the goods and chattels have been converted, he may maintain an action of trover and conversion, and recover their value. *Valentine* v. *Jackson, supra;* 1 Williams Ex'rs, 784.

The decedent's property is to be treated as his own, and it is not necessary that he be in actual possession at the time the tort is committed; he may declare as any other person upon his own property, when wrongfully damaged by another. 1 Williams Ex'rs, 785.

When the intestate has a lease for years, he may bring ejectment against one who has wrongfully taken possession. *Duchane* v. *Goodtitle,* 1 Blackf. 117; 1 Williams Ex'rs, 707.

The right to the possession of the personal property being vested in the administrator by the letters, and by operation of law, that right relating back to the period of the intestate's death, it follows that he may maintain replevin.

We again quote from 1 Williams Ex'rs, 701: "So if the goods, &c., of the testator taken away continue in specie in the hands of the wrong-doer, it has been long decided that replevin and detinue will lie for the executor to recover back the specific goods, &c.; or, in case they are sold, an action for money had and received to recover the value."

Our statutes make the following provision for the protection of estates: "Every executor or administrator shall have full power to maintain any suit in any court of competent jurisdiction, in his name as such executor or administrator, for any demand, of whatever nature, due the decedent in his lifetime, for the recovery of possession of any property of the estate, and for trespass or waste committed on the estate of the decedent in his lifetime," &c. 2 G. & H. 527.

Thus we see, that by the above authorities, administrators and executors are clothed with the same rights and powers, with respect to the personal estate, as the decedent was in his lifetime. They can maintain actions for trespass, or for injuries committed both before and after his death; actions of replevin, or for possession; actions of trover and conver-

sion; actions for money had and received for the value of the goods sold and conveyed; and actions of ejectment for the recovery of possession of leasehold estates. They have ample authority to prosecute any suit with respect to the personal estate, which the testator or intestate could have prosecuted in his lifetime.

This brings us to the case that is here upon appeal.

It is clear that the action was properly brought for the value of the vegetables and grain taken and converted by the appellant, either before or after the death of Swinehart. The authorities already cited give the administrators the right, and we might say, made it their imperative duty, to prosecute the suit. Mrs. Smith, by virtue of her being lessor, had no better claim to appropriate to her own use the grain and vegetables that had been raised upon the premises than a mere stranger. And the moment she took them she became liable to the appellees for their value.

There is no doubt as to the right of the administrators to maintain the action for the wheat, barley, parsnips, and other vegetables described in the complaint. But the action was also brought for the value of the unexpired term of the leasehold. Could the appellees, as administrators, maintain an action for an injury to this leasehold. The solution of this question depends upon whether the leasehold was personal or real property. If it was personal property, then the action was properly brought; but if it was real estate, then the administrators could not maintain the action, unless it was shown that it was necessary for the payment of the debts of the estate. Terms for years are treated in law as chattels, and go to the administrators as assets. Taylor Landlord and Tenant, § 434; 2 Williams Ex'rs, 1497. They are to be inventoried and sold as personal property.

The administrator may also assign and underlet the premises, or any part thereof, if not prohibited by the terms of the lease; and before sale he has full powers to take possession and manage the estate, accounting to the estate for the profits. 2 Williams Ex'rs, 844, 845. And he can main-

tain a suit for possession against one who has wrongfully taken possession. 1 Williams Ex'rs, 601.

It is, then, we think, well settled by the authorities, that the administrator could maintain an action for an injury that might be done to the leasehold estate. An administrator can maintain an action of trespass upon real estate, committed during the lifetime of the intestate, as it has been already shown, and in all cases can maintain such an action for injuries done to the personal estate.

Under our statute it was the duty of the administrators to inventory and appraise this lease. It was assets in their hands for the payment of the debts. Mrs. Smith entered the leased premises, and totally dispossessed and ousted the appellees, and occupied the premises the balance of the unexpired term, and has not accounted for the profits.

The court committed no error in overruling the demurrer. It is stated by the clerk, in making up the transcript, that the appellants moved to strike out parts of the complaint, and that the motion was overruled, and an exception was taken; but this statement of the clerk constitutes no part of the record. It could only become a part of the record by a bill of exceptions.

It is claimed by the appellant that this action involved the title to real estate, and that, therefore, the common pleas court had no jurisdiction. We do not think that the title to real estate was in issue. The complaint shows that the relation of landlord and tenant existed between Mrs. Smith and David Swinehart, and that the action was brought to enforce rights growing out of such relation. The lease was made a part of the complaint, and it was thus made manifest that the plaintiffs only claimed that they were entitled to the unexpired term of two years, and to a portion of the growing crop. The title to real estate can never be acquired by adverse possession, where the relation of landlord and tenant exists. The tenant can not deny the title of his landlord; for he claims possession by virtue of his landlord's title, and the possession of the tenant is the possession of the land-

lord. There is nothing in the pleadings that brings in issue the title to real estate. The appellees set up their claim as tenants of Mrs. Smith, thus admitting her title, and that she was the owner of the land. The action is for a trespass to the possession, and conversion of the growing crop, and for the unexpired term. The case was tried on the allegations of the complaint, and the denial of the defendants. This did not necessarily involve the title to real estate; and the evidence not being in the record, we cannot assume that any evidence was introduced which put in issue the title to real estate. The cases of *Maxam* v. *Wood*, 4 Blackf. 297, and *Beach* v. *Livergood*, 15 Ind. 496, settle the doctrine that in trespass to lands the title thereof is not necessarily involved.

Sec. 8, 2 G. & H. 21, provides that "guardians, executors or administrators, may sue in said court of common pleas, any and all persons against whom any claim, debt, or demand of any kind whatsoever, accrues to them in such fiduciary capacity; and in all cases where executors, administrators or guardians are plaintiffs, the common pleas shall have concurrent jurisdiction with the circuit court."

This section of the statute, if it stood alone, would be broad enough to confer jurisdiction upon the common pleas court, although the title to real estate was involved; but it has to be construed in connection with section 5 of the circuit court act, and section 11 of the common pleas act, which confer exclusive jurisdiction upon the circuit court where the title to real estate is in issue. We entertain no doubt that the common pleas court had full and complete jurisdiction of the action. The court committed no error in overruling the motion in arrest of judgment.

An informality in the judgment is relied upon, in the argument, for the reversal of the judgment; but as the proper steps were not taken in the court below to remedy such informality, it is not properly here for consideration. The suit was brought against Mrs. Smith upon a cause of action which originated while she was an unmarried woman, the widow of Harvey Heth. During the pendency of the suit,

she intermarried with Anthony Smith, who was made a defendant with her. A personal judgment was rendered against them jointly. But there was no motion made in the court below to correct or set aside the judgment for that cause, and no error can be assigned here.

This court, in *Jemison* v. *Walsh*, 30 Ind. 167, say: "This judgment was not in proper form, as the facts stated in the complaint did not entitle the appellee to this relief; but as no exception was taken to the form of the judgment, we cannot even modify it on appeal. If such exception had been reserved, the attention of the court below would have been called to this error, and a correction, perhaps, had without an appeal."

A motion in arrest of judgment cannot reach a defect in the form of a judgment, for the obvious reason that the motion must precede the rendition of the judgment, and cannot be made after judgment. The motion in arrest of judgment is defined by Bouvier's, Burrill's, and Tomlin's dictionaries as follows:

Bouvier says: "The act of the court by which the judges refuse to give judgment, because upon the face of the record it appears that the plaintiff is not entitled to it."

Burrill says: "The act of staying a judgment, or refusing to render judgment in an action at law, after verdict, for some matter intrinsic appearing on the face of the record, which would render the judgment, if given, erroneous or reversible; as where the verdict differs materially from the pleadings and issue; or where the case laid in the declaration is not sufficient, in point of law, to found an action upon. 3 Bl. Com. 393; 3 Steph. Com. 628; 2 Tidd Pr. 918; Mansel Demurrer, 162."

Tomlin says: "To move in arrest of judgment, is to show cause why judgment should be stayed, notwithstanding verdict given. Arrests of judgment arise from intrinsic causes appearing upon the face of the record, for a judgment can never be arrested but for that which appears on the face of the record itself. Ld. Raym. 232. Motions in

arrest of judgment may be made at any time before judgment signed. Dougl. 747; Str. 845."

In *Adamson* v. *Rose*, 30 Ind. 380, this court say: "The motion in arrest of judgment reaches any defect in the pleadings not cured by the verdict or the statute of amendments, or waived by failing to demur."

There having been no objection or exception to the form of the judgment when announced, and no motion to correct or vacate the judgment having been made after the judgment was entered, the question cannot be reviewed here.

The judgment is affirmed, with costs.

D. Turpie and *D. P. Baldwin*, for appellants.

S. T. McConnell and *M. Winfield*, for appellees.

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Bonsall v. The State.

Criminal Law.—*Larceny.—Evidence.*—On the trial of an indictment for the larceny of bank bills, where the evidence was that the defendant snatched a pocket book containing the bank bills from the prosecuting witness;

Held, that the offense was larceny, and not robbery, as there was neither violence nor putting in fear.

Held, also, that it was error to permit the State to prove, that, on the next day, the defendant enticed the prosecuting witness into an alley, and knocked him down, and beat him, and robbed him of other bills of a different description, as the offense was a distinct one and might have prejudiced the defendant before the jury.

Held, also, that statements of third parties tending to show that they were the persons who got the money in question from the prosecuting witness were properly excluded, as hearsay evidence.

APPEAL from the Monroe Circuit Court.

Downey, C. J.—The appellant was indicted for the larceny of twenty-two five dollar bills, of national currency, of the value of five dollars each; two twenty dollar bank bills, of national currency, of the value of twenty dollars each,

and five ten dollar bank bills, of the value of ten dollars each, of national currency, the property of William Rush, on the 16th day of December, 1870, at Monroe county, Indiana.

On being arraigned, he moved the court to quash the indictment, which motion the court overruled, and he excepted.

He then pleaded not guilty. The cause was tried by a jury, and there was a verdict of guilty. He moved for a new trial, which was denied him, when he moved in arrest of judgment, which latter motion was also overruled, and he was sentenced according to the verdict.

The first error assigned is, that the circuit court erred in overruling the motion to quash the indictment. This point is not argued or urged in the brief, and we see no defect in the indictment.

The other questions all arise under the assignment that the court erred in refusing to grant a new trial. It is urged that the court erred in admitting illegal evidence, offered by the State, and excluding legal evidence offered by the defendant, in giving instructions on his own motion, and in modifying one of those asked by the defendant; and it is also insisted that the evidence was not sufficient to sustain the finding of the jury.

The evidence, on the part of the State, tended to prove that on the 16th day of December, 1870, the prosecuting witness came to the town of Bloomington, in the forenoon, and drew from a bank two hnndred and four dollars, of which he put two hundred dollars in a pocket-book, and put it in one of his boots, while the remaining four dollars he put in another pocket-book, and put that in his vest pocket. That he and defendant drank and ate oysters together, until the money in the small pocket-book was gone, when he said he had other money, and asked defendant to pull off his boot; and that when defendant had got his boot nearly off, and he had almost drawn the pocket-book from it, the defendant snatched it from him and ran away with it. Over the objec-

tion of the defendant, the State was allowed to prove, that on the next day, the 17th, the parties were together in Bloomington, and that the defendant enticed the prosecuting witness into an alley or by-way, and there knocked him down, beat him, and robbed him of an additional, though much smaller amount of money.

This seems to us to have been a separate and distinct offense, and we know of no rule of law by which it was admissible in support of the indictment for the larceny alleged to have been committed on the 16th. It may have very seriously prejudiced the jury against the defendant, and induced them to find him guilty. It did not support the indictment, for the money taken was not of the same description as that described in the indictment. This question has often been decided by this court. *Smith* v. *The State*, 10 Ind. 106; *Engleman* v. *The State*, 2 Ind. 91; *Redman* v. *The State*, 1 Blackf. 96.

It is urged also against the conviction, that the evidence shows, if it shows any crime, the crime of robbery, and not larceny, and that there is therefore a fatal variance. This position cannot be sustained. Robbery is larceny aggravated by the fact that the goods are taken from the person of the owner by violence or putting in fear. Mr. Blackstone speaks of it as mixed or compound larceny, and says it is such as has all the properties of larceny, with the aggravation of taking from the person. And again he says, "Open and violent larceny from the person, or robbery, the *rapina* of the civilians, is the felonious and forcible taking, from the person of another, of goods or money to any value, by violence or putting him in fear." Book 4, p. 243. When, therefore, one is indicted for larceny, and the evidence shows that he might have been indicted for robbery, and that therefore the State has arraigned him for a less aggravated crime than that of which he was really guilty, he cannot complain. To prove a robbery is to prove a larceny. This point is not new in this court. See *Hickey* v. *The State*, 23 Ind. 21.

The evidence excluded was evidence of the statements of

third persons, which it was supposed tended to show them to be the parties who got the money in question from the prosecuting witness. This was mere hearsay, and was correctly excluded.

We have examined the charges given by the court, and the modification of the charge asked by the defendant, and think no error was committed by the court therein.

We say nothing as to the sufficiency of the evidence to sustain the verdict of the jury, as the case must be tried again, and the evidence may be different in the next trial of the cause.

The judgment is reversed, and the cause remanded, to be certified to the warden of the prison.

S. Claypool, J. W. Buskirk, and *J. Graham*, for appellant.

B. W. Hanna, Attorney General, and *J. C. Robinson*, for the State.

NEWHOUSE *v.* MILLER and Wife.

ASSIGNMENT OF ERRORS.—*Complaint.—Demurrer.—Waiver.—Supreme Court.* The objection that the court erred in rendering judgment for plaintiffs, because the complaint does not state facts sufficient to constitute a cause of action, is not waived by a failure to demur to the complaint, and answering it, but may be assigned for error in the Supreme Court.

WITNESS.—*Competency.—Husband and Wife.*—On the trial of an action by husband and wife for injury to the wife, the husband is incompetent to be a witness.

CONTRIBUTORY NEGLIGENCE.—*Proximate Cause.*—When negligence is the issue, it must be unmixed negligence, to justify a recovery; and if both parties by their negligence immediately contributed to produce the injury, neither can recover. When plaintiff is the proximate cause of the injury he cannot recover.

SAME.—*Complaint.—Obstruction of Highway.—Verdict.*—Complaint, that plaintiffs were in a buggy drawn by a horse, driving along a highway; that defendant obstructed the highway by then and there stopping with his wagon, drawn by two horses, in the middle of said highway; that plaintiffs requested defendant to remove, in order that they might freely pass along said highway; but de-

fendant refused; and thereupon plaintiffs, in attempting to drive and pass around said obstruction, using due care and diligence without any fault or negligence on their part, by reason of said unlawful obstruction and by the said negligence and wrongful act of defendant, were overturned and cast upon the ground with great force and violence, whereby one of the plaintiffs, wife of her co-plaintiff, was injured; wherefore, &c. No demurrer to the complaint was filed in the court below, but, on assignment for error in the Supreme Court that the complaint did not state facts sufficient,

Held, PETTIT, J., that the complaint was insufficient on the error assigned, because it was the fault and negligence of plaintiffs in attempting to drive past defendant which occasioned the injury complained of; WORDEN, J., that the complaint would have been bad on demurrer, but was cured by verdict; DOWNEY, C. J., and BUSKIRK, J., that the complaint was sufficient.

APPEAL from the Marion Common Pleas.

PETTIT, J.—This suit was brought by appellees against the appellant, and the complaint is this:

"Jacob Miller and his wife, Mary C. Miller, complain of John Newhouse, Sr., defendant, and say, that on or about the first day of July, A. D., 1869, they, the said plaintiffs, accompanied by their two minor children, were in a buggy, drawn by a horse, driving along and upon a certain public highway, known as the Millersville gravel road, situate in Washington township, county and state aforesaid, and used for the free use and unobstructed passage of all persons on foot or with their teams, horses, wagons, and carriages; that the defendant herein, well knowing the place, use, and purpose of the aforesaid highway, wrongfully and unlawfully obstructed the same, by then and there stopping with his wagon, drawn by his two horses, in and upon the middle of the said public highway; that plaintiffs requested defendant to remove said obstruction from said public highway, in order that they might the more freely pass along and upon the same, as they had a good and lawful right to do; but that defendant utterly disregarded plaintiff's request, and neglected and refused to remove said obstruction; that the plaintiffs, in attempting to pass around said unlawful obstruction in their buggy, drawn by a horse, the plaintiffs using due care and diligence, without any fault or negligence on their part, by reason of said unlawful obstruction, and by

the carelessness, negligence, and wrongful act of the defendant, were overturned and cast upon the ground with great force and violence; and that in consequence of being cast upon the ground as aforesaid, all of which was without any fault or negligence on the part of plaintiffs, the said Mary C. Miller, wife of said Jacob Miller, and one of the plaintiffs herein, was greatly bruised, cut, and otherwise seriously and permanently injured, by then and there being thrown violently to and upon the ground; so much so that she was, and thereby has been, rendered perfectly helpless and unable to leave her bed for the period of five weeks; that she still is, in consequence of the injury aforesaid, unable to attend to her household duties; that her back and spine are greatly, seriously, and permanently injured in consequence and by reason of having been so cast and thrown upon the ground with great force and violence, as aforesaid; and that ever since, she has, and now does, suffer great bodily pain; and that it will trouble her herein and injure her all the days of her natural life; and, in consequence of said injury, she does, and must, suffer constant pain and torture. Wherefore plaintiffs say, that in consequence of the aforesaid grievances herein complained of, they are damaged in the sum of ten thousand dollars, for which sum they pray judgment and all other proper relief."

Answer of general denial; trial by jury; verdict for plaintiffs for two hundred dollars; motion for new trial overruled, and exceptions; judgment on the verdict, and appeal to this court.

Two errors are assigned; first, that the court erred in overruling the motion for a new trial; second, that the court erred in rendering judgment for the appellees, because the complaint does not state facts sufficient to constitute a cause of action against the appellant.

I will consider the second assignment of error first. This objection is not waived by a failure to demur to the complaint, and answering it. 2 G. & H. 81, sec. 54. Does the

complaint state facts sufficient? I hold that it does not. It is a well settled doctrine of the law that the plaintiff cannot recover in such a case, if it appears that by the want of ordinary care or prudence on his part, he directly contributed to the injury; or, in other words, if by the exercise of ordinary care and prudence he might have avoided the injury. Where negligence is the issue, it must be a case of unmixed negligence to justify a recovery, and if both parties by their negligence immediately contributed to produce the injury, neither can recover. When the plaintiff is the proximate cause of the injury, he cannot recover. These propositions are sustained by the following, among other authorities: *Butterfield* v. *Forrester*, 11 East, 60; *The Evansville, &c., R. R. Co.* v. *Hiatt*, 17 Ind. 102; *Lofton* v. *Vogles*, 17 Ind. 105; *The Evansville, &c., R. R. Co.* v. *Lowdermilk*, 15 Ind. 120; *The Toledo & Wabash R. W. Co.* v. *Thomas*, 18 Ind. 215; *Smith* v. *Smith*, 2 Pick. 621; *Brooks* v. *The Buffalo, &c., R. R. Co.*, 25 Barb. 600; *Suydam* v. *The Grand Street, &c., R. R. Co.*, 41 Barb. 375; *Runyon* v. *The Central R. R. Co.*, 1 Dutcher, 556; *Dascomb* v. *The Buffalo, &c., R. R. Co.*, 27 Barb. 221; *Mackey* v. *The N. Y. Central R. R. Co.*, 27 Barb. 528; *Button* v. *The Hudson River R. R. Co.*, 18 N. Y. 248; *Brown* v. *Maxwell*, 6 Hill, 592; *The Cleveland, &c., R. R. Co.* v. *Terry*, 8 Ohio St. 570; *Clark* v. *Kirwan*, 4 E. D. Smith, 21; *Owen* v. *The Hudson River R. R. Co.*, 2 Bosw. 374; *Murch* v. *The Concord R. R. Corporation*, 9 Foster, 9; *Moore* v. *The Central R. R. Co.*, 4 Zabr. 268, 824; *The Toledo R. R. Co.* v. *Goddard*, 25 Ind. 185; *Michigan Southern, &c., R. R. Co.* v. *Lantz*, 29 Ind. 528; *The Evansville, &c., R. R. Co.* v. *Dexter*, 24 Ind. 411; *The Toledo, &c., R. W. Co.* v. *Bevin*, 26 Ind. 443; *The Indianapolis, &c., R. R. Co.* v. *Keely's Adm'r*, 23 Ind. 133; *The Jeffersonville R. R. Co.* v. *Swift*, 26 Ind. 459; *Knight* v. *The Toledo, &c., R. W. Co.*, 24 Ind. 402; *The Indianapolis, &c., R. R. Co.* v. *Wright*, 22 Ind. 376; *The Evansville, &c., R. R. Co.* v. *Duncan*, 28 Ind. 441; *The Lafayette, &c., R. R. Co.* v. *Sims*, 27 Ind. 59.

I hope I have cited authorities enough on this point. According to the complaint the defendant below was, with his

team, standing in the road, and the plaintiffs asked him to get out of their way; he did not comply with the request, and they attempted to drive past him, and were injured, not by any action of the defendant, but by the attempt of the plaintiffs to drive past the defendant's team. This was the fault and negligence of the plaintiffs, and I think they cannot recover.

DOWNEY, C. J., and BUSKIRK, J., hold the complaint sufficient. WORDEN, J., holds that the complaint would have been bad on demurrer, but that the defect was cured by verdict; hence we cannot reverse the judgment on the assignment of error as to the sufficiency of the complaint.

On the trial of the cause, both the plaintiffs were sworn and examined as witnesses, over the objections and exceptions of the defendant. DOWNEY, C. J., and BUSKIRK, J., hold that the wife was properly admitted, but that the husband's evidence should have been refused. WORDEN, J., and PETTIT, J., hold that both should have been rejected under our statute which prohibits husband and wife from being witnesses for or against each other. As we all hold that the husband was improperly admitted, the judgment must be reversed, which is done at the costs of the appellees, with instructions to the court, on any future trial, to refuse to allow the husband to be a witness.

J. W. Gordon and *P. H. Ward*, for appellant.

G. W. Spahr, *H. Dailey*, *J. Hanna* and *F. Knefler*, for appellees.

TRITTIPO *v.* EDWARDS.

MORTGAGE OF PERSONAL PROPERTY.—*Foreclosure.*—*Parties.*—Where A. executed a mortgage on certain personal property to B., the mortgagor to remain in possession by the terms of the instrument until delivery of the property was demanded by B., and the mortgage was duly recorded within ten days af-

ter its execution, and afterwards part of the property was sold and delivered to C. by the mortgagor, and the mortgagee subsequently demanded possession of the property from A., and on his refusal to deliver the same, demanded from C. a delivery of the property purchased by him;

Held, that C. was a proper party defendant to a suit to foreclose the mortgage.

APPEAL from the Hamilton Common Pleas.

DOWNEY, C. J.—James J. Trittipo executed a mortgage of personal property to Samuel Trittipo, the appellant; the mortgagor, by the terms of the mortgage, being entitled to retain the possession of the property until it should be demanded by the mortgagee. While the property was in his possession under this stipulation in the mortgage, the mortgagor sold two mules, part of the property mentioned in the mortgage, to the appellee, Edwards. When the mortgagee demanded possession of the property from the mortgagor, he refused to deliver it; and when he demanded possession of the two mules of Edwards, he refused to deliver them. He then brought this action against the mortgagor and Edwards, setting up the debt due him, to secure which the mortgage was executed, alleging the facts aforesaid, and praying judgment against the mortgagor for twenty-two hundred dollars, and against Edwards for two hundred dollars, the foreclosure of the mortgage and sale of the mortgaged property, or so much thereof as might be necessary to pay his debt, and for other relief. The mortgage was duly recorded within ten days after its execution.

At the first term of the court after the action was commenced, judgment, by default, was rendered against Andrew J. Trittipo for the amount of the mortgage debt, and for the sale of the mortgaged property, including the mules purchased by Edwards.

At a subsequent term of the court, Edwards demurred to the complaint, on the grounds that it did not state facts sufficient, that there was a misjoinder of causes of action, and a misjoinder of parties defendants. This demurrer was sustained, the plaintiff excepted, and final judgment was rendered for the said Edwards.

The sustaining of this demurrer is the only error assigned.

Conceding, without deciding, that no judgment for the value of the two mules could be rendered against Edwards in this action, still we think he was rightly made a party to the action, for the reason that he was the owner of the mules. subject to the mortgage, and having the possession of them, it was necessary that he should be made a party in order to foreclose his equity of redemption, and subject the property in his hands to sale.

In *The Branch Bank at Mobile* v. *Taylor*, 10 Ala. 67, which was a bill to foreclose a chattel mortgage, the court say: "In the case of personal estate, in order to consummate a sale, the possession would necessarily be changed, and this makes it necessary, where a third person is in possession, under a claim of right, that his title should be passed upon before the sale takes place." See *Singleton* v. *Gayle*, 8 Port. 270; *Woodward* v. *Wilcox*, 27 Ind. 207.

It seems that the court might, after an adjudication of the right of the vendee of the mortgagor, and when his right has been found to be subject to the mortgage, make and enforce an order against him for the delivery of the property to the proper officer, to be sold. See *Ragsdale* v. *The Commonwealth*, and *The Commonwealth* v. *Ragsdale*, 2 Hen. & Munf. 8.

Certainly, after it had been settled that the property was liable to sale to pay the mortgage, if the vendee of the mortgagor should convert the property, or should before have converted it to his own use, he would be liable to an action therefor at the suit of the mortgagee. *White* v. *Phelps*, 12 N. H. 382.

The judgment is reversed, with costs, and the cause remanded.

D. Moss and *F. M. Trissal*, for appellant.

T. J. Kain and *A. F. Shirts*, for appellee.

LANG *et al.* *v.* COX and Another.

ASSIGNMENT OF ERRORS.—*Names of Parties.*—On an appeal to the Supreme Court, the assignment of errors must state the names of all the parties to the appeal; and if any of the appellants be therein designated only by the words "*et al.*," the appeal will be dismissed.

APPEAL from the Marion Common Pleas.

WORDEN, J.—It is suggested by counsel for the appellee, or appellees, that the assignment of error is defective in not setting out the names of all the parties, in accordance with the long standing rule on that subject. The assignment sets out the names of the parties as follows: "James Lang *et al.* *v.* Andrew J. Cox and Joseph B. Dessar." It appears that there are other appellants besides James Lang, whose names are not set out, but who are embraced in the "*et al.*"

This case illustrates the propriety of the rule, and the necessity of exercising some care in stating the names of the appellants and the appellees. The errors are assigned against Andrew J. Cox and Joseph B. Dessar as appellees. Dessar, by the record, cannot be made an appellee with Cox. If he is a party to the record in this court, he must be an appellant. The suit was brought below by Cox as sole plaintiff against Marie Darsch, James Lang, and Joseph B. Dessar. On the trial, there was a finding and judgment in favor of Mrs. Darsch; so that she may be supposed to be out of the controversy, inasmuch as Cox, who stood opposed to her in the court below, is pressing nothing against her in this court. There was a finding and judgment in favor of Cox, as against Lang and Dessar. Lang and Mrs. Darsch jointly moved for a new trial, but the motion was overruled, and exception taken. Dessar did not move for a new trial, nor preserve any question in the record. If Dessar and Mrs. Darsch are intended to be included as appellants under the "*et al.*," their names should be stated. If not, the course should be pursued that is provided for in section 501 of the code; unless, indeed, an appeal will lie under the circum-

stances in the name of Lang alone as appellant, a point which we need not now decide. The name of Dessar was possibly used as an appellee through mistake.

The appeal is dismissed for informality in the assignment of errors, and for want of compliance with the rule on the subject.

H. A. Brouse, *J. W. Gordon*, and *W. March*, for appellants.

J. T. Dye and *A. C. Harris*, for appellees.

FOIST *v.* COPPIN and Another.

JUSTICE OF THE PEACE.—*New Trial.—Sufficiency of Notice.*—Where a party appears before a justice of the peace on the hearing of a motion for a new trial, and does not object to the sufficiency of the notice, he cannot afterwards avail himself of that objection.

SAME.—*Judgment.*—A justice of the peace has no power to change, vacate, or in any manner interfere with a judgment he has rendered, except to grant a new trial, or to enter satisfaction where judgment is subsequently paid.

APPEAL from Jackson Circuit Court.

BUSKIRK, J.—The facts necessary to a proper understanding of the questions involved are these: Joseph R. Coppin, on the second day of January, 1857, commenced before a justice of the peace an action against John Foist and Sarah, his wife, for a debt created by Sarah prior to her marriage.

The case was tried before the justice on the 10th day of January, and resulted in a finding for the defendants. On the 13th of January, notice was served on defendants that a motion would be made for a new trial on the 14th. On the 14th, the parties appeared before the justice, and the defendants, without making any objection to the sufficiency of the notice, appeared to and resisted the motion for a new trial. The motion was granted, and a new trial awarded. After the new trial was granted, notice was served on defendants,

that the case would be tried on the 24th day of January. On the day set for trial the parties appeared, and defendants moved to set aside the granting of a new trial on account of the insufficiency of the notice. The motion was overruled. The case was, by the agreement of the parties, continued until the 3d day of February, 1857. On that day, the plaintiff appeared, but the defendants did not appear. The cause was tried by the justice, who rendered a judgment for plaintiff of fourteen dollars and eighty cents.

The judgment having been assigned to Bain, he, on the 28th day of October, 1867, filed an affidavit before the justice having the docket containing said judgment, to obtain an execution. The justice issued an execution on the 4th day of November, 1867. John Foist, on the 11th day of November, 1867, filed with the said justice his motion to have the said judgment vacated and declared null and void, and the execution recalled. His motion was heard on the 16th day of November, and was by the justice dismissed on account of the insufficiency of the matters alleged in the motion. The appellant then appealed to the circuit court, where the case was, by the agreement of the parties, tried by the court, and resulted in favor of the appellees; and this case is brought to this court to obtain a reversal of the judgment of the circuit court refusing to vacate the said judgment, and to order a return of the execution.

The motion of the appellant to have the judgment rendered on the 3d day of February, 1857, declared null and void, and the execution returned, was based on two grounds. The first was, that the notice of the intended application for a new trial was insufficient. The second was, that the new trial was granted on the 5th day after the judgment was rendered, and that, by reason thereof, the justice had no power or authority to grant a new trial, and that the granting of such new trial and all subsequent proceedings were null and void. There is nothing in the first objection. It is shown by the record and the evidence that notice was served on the day before the new trial was granted. But it makes no

difference whether there was any notice, as the appellant was present when the new trial was granted, and made no objection to the sufficiency of the notice. An appearance without objection waived any defect or insufficiency in the notice.

The statute provides that justices may grant new trials within four days after the rendition of the judgment. The record of the justice shows that the application for a new trial was made on the 13th of January, 1857, and that it was granted. The record on the 3d of February recites that the notice was served on the 14th of January. This recital constituted no part of the record on the 3d of February, and could not control the previous record, which showed when the new trial was granted. But there is an objection that is fatal to the whole proceeding. Section 115 of the justice's act, 2 G. & H. 609, gives to a justice the power to enter satisfaction of a judgment on his docket. This proceeding is based on the theory that the judgment was valid, but had been paid subsequent to its rendition. The proceeding in the case under consideration is not to enter satisfaction of the judgment, but to have it vacated and declared null and void from the beginning. It is claimed that the judgment was void for the want of power and authority in the justice to render the judgment. The court of a justice of the peace is one of inferior and limited jurisdiction, and can exercise no power nor do any act that is not expressly granted or authorized. No authority has been conferred upon justices to declare void and vacate judgments. They may grant new trials within four days; and they may grant a new trial within ten days, when the judgment was rendered by default. See sec. 56, 2 G. & H. 592, and sec. 62, 2 G. & H. 593. And they may enter satisfaction, in whole or in part, where payments have been made. With these exceptions, they have no power to change, vacate, or in any manner interfere with judgments by them rendered. The proper remedy, if any existed, in the case under consideration, was

by an application to the chancellor to enjoin the collection of the judgment.

The judgment is affirmed, with costs.

W. K. Marshall, for appellant.

R. M. Kelly, for appellees.

NELSON and Others *v.* DAVIS.

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CONVEYANCE.—*Construction.*—On the 8th of November, 1842, A., for a pecuniary consideration, made to B. and C., as trustees of D., daughter of A., a conveyance of real estate, the *habendum* whereof was as follows: "unto them, the said B. and C., as trustees for the said D., and for her sole and proper benefit and behoof, and for no other purpose whatever, during the natural life of the said D., and at her death to descend to the children of the said D., if any she have, and if not, to her assigns forever."

Held, that the instrument was a deed of bargain and sale.

Held, also, that by the statute of uses, 27 Henry VIII., the legal title was vested in the trustees, and not in the *cestui que use.* What would be the effect of such ah instrument if executed under the statue of 1843 or 1852 is not decided.

Held, also, that the conveyance vested in D. an equitable title for her life only, which she could effectually convey.

SAME.—*Conveyance to Trustee.*—A conveyance to a trustee is commensurate with the estate conveyed to the *cestui que trust*, and is limited and qualified by the words of limitation applied to the estate of the *cestui que trust.*

SAME.—"*Heirs.*"—Conveyances by deed, at common law, or to uses under the statute of uses, or creating powers of appointment, in order to transmit the fee, must contain the word *heir* or *heirs.*

TENANTS IN COMMON.—*Adverse Possession.*—When one tenant in common is in possesion of the whole estate, claiming under a deed purporting to convey the entire estate, he will be deemed to have ousted his co-tenants.

APPEAL from the Posey Circuit Court.

WORDEN, J.—Complaint by the appellants against the appellee to recover certain real estate. Demurrer sustained to the complaint, and final judgment for the defendant. Exception.

The complaint alleges, in substance, the following facts: That on the 8th of November, 1842, William Rogers, and Jane, his wife, were seized in fee of the land in controversy; that on the same day, in consideration of eight hundred dollars, they conveyed the same to Preston C. Rogers and John Cox, as trustees of Elizabeth Rogers, daughter of said William and Jane.

Habendum: "Unto them, the said Preston C. Rogers and John Cox, as trustees for the said Elizabeth, and for her sole and proper benefit and behoof, and for no other purpose whatever, during the natural life of the said Elizabeth, and at her death to descend to the children of the said Elizabeth, if any she have, and if not, to her assigns forever."

That in 1845, the said William and Jane, the grantors, departed this life, and that the plaintiffs are their only heirs now living; that on the 20th of November, 1864, the said Elizabeth and her husband, she having intermarried with one Harrison Newsome, conveyed the property in fee, with general covenants of warranty, to the defendant, for the consideration of sixteen hundred dollars; that the defendant thereupon took possession of the property and still retains the same; that in February, 1869, the said Elizabeth died, never having had any children; that in March, 1869, the plaintiffs demanded of the defendant possession of the premises; and that the defendant refused and still refuses to deliver up the same to the plaintiffs; wherefore the plaintiffs say that they are the owners of the property in fee, and that the defendant holds the same without right, &c.

The main question in the case is, whether anything more than a life estate, either legal or equitable, for the life of said Elizabeth, passed by the conveyance from William and Jane to the grantees therein named. The word "heirs," generally essential in common law conveyances in order to the transmission of the fee, is lacking in the deed in question.

It is claimed by the counsel for the appellants, and conceded by counsel for the appellee, that inasmuch as the con-

veyance was for the sole use and benefit of Elizabeth, without any power of sale or otherwise coupled with the trust, the statute of uses, 27 Henry VIII., executed the use and vested the legal title at once in Elizabeth. We do not concur in this view, although we are inclined to the opinion that the legal rights of the parties must be the same as if the case were to be put upon that ground. The deed in question is a deed of bargain and sale.

This species of conveyance, says Blackstone, was introduced by the statute of uses. Before the passage of the statute, the title to real estate could not be transmitted simply by a deed of bargain and sale. Livery of seizin could not thus be dispensed with. It was the practice before the statute for a person seized of lands to bargain and sell them to another, in which case, if the consideration was sufficient to raise a use, the bargainor became immediately seized to the use of the bargainee. And since the passage of the statute, the use vested in the bargainee by a deed of bargain and sale is at once executed by the statute, and the legal title vested in the bargainee. But the statute executes but one use; and, therefore, if a use be limited upon a use, the statute executes the one, but not both uses. 2. Bl. Com. 336, 338; 2 Greenl. Cr. 138; 2 Washb. Real Prop. 392.

In our opinion, the title to the property in question was, by virtue of the statute of uses, vested in the trustees, but not in the *cestui que use*, Elizabeth Rogers. We speak, of course, of the law as it stood at the date of the execution of the deed in question, and do not undertake to determine what might have been its legal effect had it been executed under the statute of 1843 or 1852. See Rev. Stat. 1843, p. 447; 1 G. & H. 652.

Now, although Elizabeth had not any legal title to the premises, as we think, by virtue of the deed in question, yet she had an equitable title which she could convey as effectually as if she had been vested with the legal estate; and hence it becomes necessary to inquire as to the quantity,

extent, or duration of the equitable estate thus vested in her.

A conveyance to a use requires the same words to transmit the fee that are required in other conveyances. "When uses," says Chancellor KENT, "were by statute transferred into possession, and became legal estates, they were subjected to the scrupulous and technical rules of the courts of law. The example at law was followed by the courts of equity, and the same legal construction applied by them to a conveyance to uses. If a person purchase to himself forever, or to him and his assigns forever, he takes but an estate for life. Though the intent of the parties be ever so clearly expressed in the deed, the fee cannot pass without the word 'heirs.'" 4 Kent Com. 5.

The quantity of the estate, although an equitable estate only, which vested in Elizabeth by the conveyance, was the same as if it had been conveyed to her directly in the same language, without the interposition of trustees. It may be observed that the word "heirs" is not used in connection with the estate vested in the trustees, or in the use vested in Elizabeth. But had it been used in connection with the estate of the trustees, it would not seem on principle or authority, to enlarge the interest limited by the terms of the deed to Elizabeth. The estate of trustees may, perhaps, be restricted or extended, as the exigency of the trust may require. Hill Trustees, 239, 249. We make the following extract on this subject from another author: "In the case of conveyances in trust, the trustee will take the legal estate in fee, although limited to him without the word heirs, if the trust which he is to execute be to the *cestui que trust* and his heirs. The words of limitation and inheritance in such cases are connected with the estate of the *cestui que trust*, but are held to relate to the legal estate in the trustee, because without such construction the trustee would not be able to execute the trust. His estate would be commensurate with the trust, and that only, even though it were to him and his heirs, and the trust was for life only in the *cestni*

que trust. Thus a grant to A. B., in trust to sell, carries the fee. So, if to A. and his heirs, in trust for B., until he attains twenty-one years; the trustee takes a chattel interest only, and though the trust is to 'heirs,' if the trustee dies, his executor is to execute the trust, and not his heirs." 1 Washb. Real Prop. 72.

We think it to be quite clear, on the authorities, that the legal estate of the trustees was simply co-extensive with the use vested in Elizabeth, and that that use was limited to the life of Elizabeth; for the reason that the deed does not contain the word "heirs," which is essential to carry the fee. Here again we speak of the law as it stood at the date of the deed in question, since which time it has probably changed in this respect by statute. 1 G. & H. 260, sec 14.

The counsel for the appellee insists, however, that the case comes within the rule in Shelley's case, and that Elizabeth took the fee. Chancellor KENT quotes from PRESTON the following definition of the rule in Shelley's case, as being full and accurate: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." 4 Kent Com. 215. It will be observed that to bring a case within the rule, the limitation must be to the heirs, or the heirs of the body, of the person taking the freehold.

"The word children, in its primary or natural sense, is always a word of purchase, and not a word of limitation; and the word issue is very frequently a word of purchase also. But heirs and heirs of the body are, in their primary and natural sense, words of limitation, and not of purchase." Chancellor WALWORTH, in case of *Schoonmaker* v. *Sheely*, 3 Denio, 485.

In *Sorden* v. *Gatewood*, 1 Ind. 107, the grant was to Sarah

Gatewood, "to have and to hold said tract of land to the said Sarah during her natural life, and to her children and their assigns forever." It was held that these were words of purchase, and not of limitation, and that Sarah took but a life estate. So, also, in the case of *Doe* v. *Jackman*, 5 Ind. 283, a bequest was made to a son and daughter during the term of their natural lives, and after their decease, to their children, the heirs of their bodies, forever. It was held, that even this language, and in a will, did not bring the case within the rule, and that the son and daughter only took a life estate. See, also, the case of *Siceloff* v. *Redman's Adm'r*, 26 Ind. 251.

Washburn says: "If the term made use of in the limitation is 'son' or 'child,' and it is used in the sense of heirs, and not as a *designatio personæ*, but comprehending a class to take by inheritance, it is to be taken as a term of limitation, and accordingly brings the case within the rule in Shelley's case. So it is with the word 'issue.' The context in these cases may be resorted to, to get at the sense in which the term or terms are used. And if, as thus construed, heirs in the technical sense are intended, the case would come within the rule." 2 Washb. Real Prop. 274.

This doctrine, as applied to wills, is in harmony with the general principles of law; as in wills, the word heirs is not necessary to the transmission of the fee, but other words denoting an intention to pass the fee will be efficient for that purpose. 4 Kent Com. (10th ed.) 656.

But as applied to deeds, it is hardly reconcilable with the common law doctrine that the word heirs, the place of which no synonym can supply, is necessary to the conveyance of the fee.

The case does not, in our opinion, come within the rule in Shelley's case.

It is also claimed by the appellee, that the language of the deed created a power of appointment in case the said Elizabeth had no children, and that the power was well executed

by her conveyance to the defendant; and that in this view, the title is in the defendant.

There seem to be insuperable difficulties in maintaining the defendant's title on this theory.

The power alluded to is one of those of "a latent and mysterious character," as described by Chancellor KENT, that derive their effect from the statute of uses. No formal set of words is requisite to create or reserve a power. It may be created by deed or will, and it is sufficient that the intention be clearly declared. 4 Kent Com. 319. Now, in our opinion, the intent to create a power is not clearly declared in the deed under consideration. The language is, "To have and to hold," &c., "for the said Elizabeth, and for her sole and proper benefit and behoof, and for no other purpose whatever, during the natural life of the said Elizabeth, and at her death to descend to the children of the said Elizabeth, if any she have, and if not, to her assigns forever."

For the sake of perspicuity we will leave out that portion that relates to the interest to be taken by the children of said Elizabeth, and bring into juxtaposition the portions that relate to the interest to be taken by herself. The sentence then will read something like this: "To have and to hold," &c., "during the natural life of the said Elizabeth, and in default of children, to her assigns forever." Now, thus read, it is quite clear that the words, "to her assigns forever," were used for the purpose of defining the quantity of the estate intended to be vested in her, and for no other purpose. If it was the intention of the grantors to vest in Elizabeth something more than a life estate, and if that intention has failed, through the ignorance of the conveyancer or otherwise, that is no reason why the language of the conveyance should be tortured into something that was evidently not intended, or perhaps conceived of, either by the grantors who executed, or the conveyancer who prepared the deed.

The case is but one among many, where an intent to convey something more than a life estate has been manifested,

but the purpose has failed for want of sufficient words to transmit anything more.

But conceding that the language employed might be sufficient to create a power, we will consider the case further on that theory. William and Jane Rogers must be regarded as the donors of the power; Elizabeth, the donee or appointor; and any person to whom she might "assign," the appointee. The deed from William and Jane is the instrument creating the power; and the deed from Elizabeth and her husband must be regarded as the instrument by which the power was executed.

We quote, as applicable to the case, the following passages from elementary writers: "It is important to bear in mind that an appointment, under a power, operates not as a conveyance of the land itself, but as a creation or substitution of a use to which the statute annexes the seizin. It is, therefore, always necessary, when creating a power, to raise or create a seizin in some one which shall be ready to serve the use when created by such appointment; and to that end, the seizin which is raised for the purpose must be commensurate with the estates authorized to be created under the power. If an estate were, therefore, conveyed to A., to such uses as B. should appoint, B. could appoint no greater estate in the use than the estate in A., and if the latter were for life only, B. could not appoint to C. in fee."

Again: "In case of a deed creating a power, the seizin or interest to serve the estate is actually raised by the deed itself, and the estates limited under the power accordingly derive their essence from that seizin. The appointor is merely an instrument; the appointee is in by the original deed." 2 Washb. Real Prop. 319.

"The seizin must be co-extensive with the estate authorized to be created under the power; and, therefore, if a life estate be conveyed to A., to such uses as B. should appoint, he cannot appoint any greater interest than that conveyed to A." 4 Kent Com. 323.

We have seen that but a life estate in the use was conveyed to Elizabeth by the deed in question, and that the seizin of the trustees was but co-extensive with the use, and was, consequently, but for her life; and it is clear, under the authorities, that no use could be raised by her appointment that would extend beyond the seizin. It comes back at last to the proposition, that conveyances by deed at common law, or to uses under the statute of uses, or creating powers of appointment, in order to transmit the fee, must contain the technical terms which the law has, for centuries, deemed indispensable for that purpose.

As Elizabeth had a life estate in the use, that, of course, passed by her deed to the defendant. Her father and mother held the reversion until their death; and upon the happening of that event, it descended to their heirs. This event happened, it is alleged, in 1845, and before Elizabeth and her husband conveyed to the defendant. At that time, she had inherited her share of the reversion, and we see no reason why that should not be regarded as having passed to the defendant under the deed to him. To be sure, at the time of Elizabeth's conveyance to the defendant, it was uncertain whether the reversioners would be entitled to possession on her death, as that would depend upon whether she left children; but her share of the reversion was vested in her at the time of her conveyance, and it mattered not, for the purpose of conveying it, when, or upon what contingency, the reversioners would be entitled to possession. It was a right that she could convey, and we think, as before stated, that it passed by the deed. As Elizabeth died without children, the reversioners became entitled to possession on her death. The result is, that the plaintiffs and defendant are tenants in common of the property, the defendant holding the share of the reversion that descended to Elizabeth.

In this aspect of the case, the appellee makes the point that the complaint is defective, in not showing that the defendant denied the plaintiffs' right, or did some act amount-

ing to such denial, as required by the statute. 2 G. & H. 285, sec. 614. Under the whole circumstances, we think it sufficiently shown that the defendant is holding adversely to the plaintiffs, and not as a joint tenant with them, and that the statute of limitations is running against them. It is shown that the deed from Elizabeth and her husband to the defendant was for the entire property, and in fee, and that he thereupon took possession of the property and still retains the same, and we think it will be intended that he took and retains such possession under the deed.

In the case of *Clark* v. *Vaughan*, 3 Conn. 191, it was held that the fact that one tenant in common is in possession of the estate claiming to hold by a deed covering the whole of it, is sufficient evidence of ouster to support ejectment by a co-tenant. The demurrer to the complaint should have been overruled.

The judgment below is reversed, with costs, and the cause remanded.

E. M. Spencer and *W. Loudon*, for appellants.

C. Denby, *J. Pitcher*, and *H. C. Pitcher*, for appellee.

WHITE and Another *v.* CRONKHITE.

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SHERIFF'S SALE.—*Irregularities.*—*Evidence.*—A. sued B. for the recovery of real estate and damages for its detention. The right of A. to recover depended on whether a sheriff's sale and conveyance to him was valid, he not being the judgment-plaintiff or chargeable with notice of any irregularities in the sale. A. introduced the judgments, executions, and sheriff's deed, and proved payment of purchase-money and his damages, and rested. B. offered to prove that the sheriff omitted to post notices of the sale in the township where the real estate is situated, and that the property sold for only one half its cash value. The court refused to admit the evidence.

Held, that the evidence was properly excluded.

SAME.—*Instruction.*—The court charged the jury, "If you find that the judgments, and executions, and the sheriff's deed are valid, and they are if nothing to the contrary appears, you ought to find for the plaintiff."

Held, that this instruction stated the law.

APPEAL from the Fountain Circuit Court.

DOWNEY, C. J.—Cronkhite sued White and two others for the recovery of real estate and damages for its detention. The right of Cronkhite to recover depended on the validity of a sheriff's sale and conveyance of the land on executions. Cronkhite, having introduced the judgments, executions, and sheriff's deed, and proved the payment of the purchase-money and his damages, rested his case. The defendant offered to prove that the sheriff, in advertising the land for sale, did not post up any notices in the township in which the real estate is situated, and that the real estate sold for only one-half of its cash value. Which evidence the court refused to admit.

The court instructed the jury as follows: "If you find that the judgments, and executions, and the sheriff's deed, are valid, and they are if nothing to the contrary appears, you ought to find for the plaintiff."

These rulings of the court, in refusing to admit said evidence and in thus charging the jury, were excepted to, and present the only questions in the case. Was the case made out without any other evidence than that which was given? Cronkhite was not the judgment-plaintiff, nor in any way charged with notice of the alleged omission or irregularity of the sheriff in making the sale.

It seems to be established by the decisions of this court, that when the judgment, execution, and deed are shown, by a *bona fide* purchaser of real estate, at sheriff's sale, it will be presumed that the sheriff did his duty in advertising the sale. *Armstrong* v. *Jackson*, 1 Blackf. 210; *Frakes* v. *Brown*, 2 Blackf. 295.

It has also been decided, that the title of a purchaser of real estate at sheriff's sale, who pays the purchase-money, and receives the sheriff's deed, cannot be affected by the cir-

cumstance that the return of the execution is imperfect, or that none was made. *Doe* v. *Heath*, 7 Blackf. 154.

Carrying out this theory of the law, the legislature has provided that any sheriff who shall sell any real estate without giving the previous notice directed, or shall sell the same otherwise than in the manner prescribed, shall forfeit and pay to the party injured, not less than ten nor more than two hundred dollars, in addition to such other damages as the party may have sustained, to be recovered from the sheriff, or from him and his sureties, in an action on his official bond. 2 G. & H. 252, sec. 474.

If it be true that the sheriff omitted to give the proper notice of the sale, the defendant is not without remedy. He can sue the sheriff, or if he prefer, or the sheriff be insolvent, he may sue on the bond of the sheriff, and make the sureties liable with him.

The plaintiff having acted upon the presumption that notice had been given, and having purchased the property upon that belief, it was not allowable to defeat his title by proof to the contrary. Had he been the plaintiff in the action, or otherwise chargeable with notice of the omission or irregularity, the rule might have been different.

The judgment is affirmed, with five per cent. damages and costs.

J. McCabe, for appellants.

J. H. Brown and *L. S. Miller*, for appellee.

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Quinn *v.* The State.

Election.—*Voter.—Qualifications.*—An indictment charged that the defendant voted at an election, "not having the legal qualifications of a voter."

Held, that the indictment was bad for not specifying what qualifications the voter lacked—for alleging, not a fact, but a conclusion of law.

SAME.—*Resident of Township.—Constitutional Law.*—The constitution requires that a person shall have a residence in the township where he offers to vote, without prescribing any period of residence; and the requirement of a residence in the township of twenty days in section one of the act of 1867 (3 Ind. Stat. 234) and section six of the act of 1869 (3 Ind. Stat. 236) is unconstitutional.

APPEAL from the Wayne Criminal Circuit Court.

DOWNEY, C. J.—The appellant was indicted for illegal voting. He moved to quash the indictment, which motion was overruled, and he excepted. On the plea of not guilty he was tried by a jury, and found guilty. He made a motion for a new trial, and also in arrest of judgment, which motions were successively overruled, the proper exception taken, and judgment rendered. He assigns for error: first, that the court erred in refusing to quash the indictment; second, in refusing him a new trial; third, in refusing to arrest the judgment; fourth, in rendering judgment and sentence on the verdict.

The indictment charges that on the 11th day of October, 1870, at said county, an election, duly authorized by law, was held for the election of a secretary of state of the State of Indiana; and that John Quinn, then and there, not having the legal qualifications of a voter at such election, unlawfully, knowingly, and wilfully voted at said election, contrary to the form of the statute in such case made and provided, &c.

This indictment is, no doubt, predicated on sec. 59, 2 G. & H. 473, which is as follows: "Any person, not having the legal qualifications of a voter at any election authorized by law, to be held in this State, for any officer whatever, who shall vote, or offer to vote at such election, shall be fined not less than five nor more than one hundred dollars."

The objection urged against the indictment is, that it does not specify the qualification or qualifications which the defendant lacked to make him a legal voter.

We think this objection ought to have prevailed. Notwithstanding the form of indictment used in this case may be found in a work of much merit on criminal practice in this State, we are compelled to hold that, in this respect, it

is defective. The allegation that the defendant had not "the legal qualifications of a voter," is in its nature the statement of a legal conclusion, and not an allegation of fact. Among other essentials of an indictment, is this: that it must contain "a statement of the facts constituting the offense, in plain and concise language, without repetition." 2 G. & H. 401, sec. 54. How does this case differ in principle from that of *The Indianapolis, &c., R. R. Co.* v. *Bishop*, 29 Ind. 202, followed by this court at the present term in the case of *The Indianapolis &c., R. R. Co.* v. *Robinson, ante*, p. 380? That these latter cases are civil cases, while the case at bar is a criminal action, can make no difference. The rule of pleading is the same. If there was or should be any difference, it should be in favor of greater certainty and particularity in the criminal, than in the civil cases. It was held in these cases that to allege that the "defendant's road was not fenced as required by law," was stating a legal conclusion, and not a fact.

In England, it is made criminal by their game laws for any person not possessing certain qualifications to kill game, &c., and it has been constantly held to be necessary, in indictments against persons for violations of these laws, to traverse every legal qualification; and that it is not sufficient simply to allege that the person was not duly or legally qualified. *Rex* v. *Jarvis*, 1 Burr. 148; *The King* v. *Hill*, 2 Ld. Raym. 1415.

In *The State* v. *Moore*, 3 Dutcher, 105, under a statute of New Jersey, nearly in the same language as the statute on which the indictment in this case is founded, where the indictment alleged, that the defendant "did wilfully and unlawfully, give in his vote for the officers aforesaid, he, the said William J. Moore, then and there not being duly qualified to vote at said election for said officers, and then and there well knowing himself not to be duly qualified to vote at said election for said officers," &c., the court say, after considering and disallowing other objections, "But the indictment is fatally defective in not specifying the particular disability which is relied on as a disqualification of the de-

fendant as a voter. It lacks, in this particular, the first essential of a valid indictment, inasmuch as it does not apprise the defendant of the precise nature of the offense with which he is charged, so as to enable him to prepare his defense. It charges, indeed, that the defendant was not duly qualified to vote; but that is tantamount to charging that he labors under one or more of numerous disabilities imposed by the constitution and laws. Under what disability does he labor? That specific charge the State must establish upon the trial. That charge the defendant may repel by his evidence, and that, by every principle of good pleading, the defendant is entitled to know from the face of the indictment itself. But how can he know from this indictment the particular charge upon which the State means to rely, or the evidence necessary to make good his defense? Under this indictment the State may prove that the defendant is not white, or that he is not a citizen of the United States, or not a resident of this State one year, or of the county in which his vote was cast five months before the election, or that he was a pauper, or a convict, or any other constitutional or legal disqualification. The defendant must come prepared to prove his color, his age, his citizenship, and his residence; to rebut evidence of his being a pauper or a convict; or if convicted, to prove a pardon. A charge so general and so indefinite is inconsistent with the well settled rules of criminal pleading, and must of necessity embarrass, if not fatally prejudice the defendant in making his defense." And the indictment was held bad.

The court, in its directions to the jury, told them that, to constitute a legal voter, the party must be twenty-one years of age; must have been a *bona fide* resident of the State of Indiana for the six months immediately preceding the time of voting, and a *bona fide* resident of the township or precinct in which he votes or offers to vote, for twenty days next before that time, or in case of foreign birth, that he has resided in the United States one year, and has declared his intention to become a citizen thereof, in conformity to the laws thereof, and has the residence in the State for six

months, and the township for twenty days, as above stated. An effort was made by the defendant to get an instruction to the jury that he was a voter without the residence of twenty days in the township or precinct, if he possessed the other qualifications enumerated by the court, and was, at the time of voting, or offering to vote, a *bona fide* resident of the township or precinct; but the court refused to give the instruction.

Sec. 2 of article 2, of the constitution of the State is as follows:

"In all elections, not otherwise provided for by this constitution, every white male citizen of the United States, of the age of twenty-one years and upwards, who shall have resided in the State during the six months immediately preceding such election; and every white male, of foreign birth, of the age of twenty-one years and upwards, who shall have resided in the United States one year, and shall have resided in this State during the six months immediately preceding such election, and shall have declared his intention to become a citizen of the United States, conformably to the laws of the United States on the subject of naturalization, shall be entitled to vote in the township or precinct where he may reside."

In section 1, of the act of March 11th, 1867, 3 Ind. Stat. 234, it is enacted, "that no person shall be deemed to have acquired a residence in any township, city, or ward, so as to entitle him to vote therein, until he shall have been a *bona fide* inhabitant of such township, city or ward, at least twenty days before the day of election at which such person shall offer to vote." And in section 6 of the act of May 13th, 1869, 3 Ind. Stat. 236, it is enacted, that a person whose right to vote is challenged shall make oath, among other things, that he has been, "for twenty days last past, a *bona fide* resident of the township, precinct or ward."

We are of the opinion that these enactments are unconstitutional and void. The constitution requires only that the person shall be a resident of the township or precinct, in

order to entitle him to vote, if he possesses the other qualifications, and the legislature cannot say that this residence shall be, or shall have been, for any specific length of time. If it can say that it shall require twenty days to constitute a residence, why may it not say that it shall require ninety, or three hundred and sixty-five days?

In the case under consideration, suppose the defendant had resided in some other county in the State than Wayne county, or had resided in a township in that county different from the one in which he voted, for more than six months immediately preceding such election, but had removed to that township, and become a *bona fide* resident thereof on the tenth, or an any other day short of twenty days, prior to the election held on the 11th day of October, 1870, would he not, so far as this question is concerned, have been entitled to vote according to the constitution? It seems clear to us that he would.

It is not in the power of the legislature, by changing, or attempting to change, the well understood and commonly received sense of words in the constitution, as it attempted to do in the act of 1867, above quoted, to avoid or change the meaning or effect of a provision of the constitution. A person who has fixed his place of habitation at a point, intending to remain there, is a resident of that place. Webster defines the word "reside" to mean, "To continue to sit; to remain; to dwell permanently, or for a length of time; to have a settled abode for a time; to abide continuously; to have one's dwelling or home; to remain for a long time." It is clear to us that the word "reside," used in the clause of the constitution with reference to suffrage, was intended to embrace the idea of fixed or permanent residence. There must be the act of abiding or dwelling at the place, with the intention of remaining. Whenever these two unite there is residence, within the meaning of the constitution, and the party, so far as this qualification is concerned, is a voter.

Judge COOLEY, in his work on Constitutional Limitations, p. 64, says: "Another rule of construction is, that when the

constitution defines the circumstances under which a right may be exercised, or a penalty imposed, the specification is an implied prohibition against legislative interference, to add to the condition, or to extend the penalty to other cases."

In *Rison* v. *Farr*, 24 Ark. 161, the court held, that when the constitution, as in that State, fixes the qualifications of, and determines who shall be deemed qualified voters, these qualifications cannot be added to by the legislature. In addition to the requisites or qualifications required by the constitution, an act of the legislature provided that the voter should, among other things, swear that he had not voluntarily borne arms against the United States, or that State, &c., and the court held that the constitution of the State having fixed the qualifications of voters, this act of the legislature requiring an additional qualification was unconstitutional and void.

We know that many of our people honestly change their places of residence within twenty days next before each election. All these persons are, by the acts in question, deprived of a constitutional right, if this legislation is held valid. On the other hand, it may be conceded that persons may, from improper motives claim to have a residence where they have none, in order to exercise the right to vote. But the innocent should not be punished or deprived of their rights in order to punish the guilty, or to prevent them from doing wrong. The court, having instructed the jury that a residence of twenty days in the township was necessary to entitle the defendant to vote, committed an error.

The judgment is reversed, and the cause is remanded.

W. A. Peelle and *H. C. Fox*, for appellant.

B. W. Hanna, Attorney General, for the State.

CHEEK v. THE STATE.

CRIMINAL LAW.—*Admission of Evidence.*—On a trial for murder, a statement of the deceased person, made before the commission of the act, and not made in the presence or hearing of the defendant, is not competent evidence against him.

SAME.—*Exclusion of Evidence.*—On a trial for murder, it is error to exclude evidence tending to show that the person killed by the defendant had entered into a combination with a third person to induce the defendant's wife to elope with such third person and leave her husband and children, and that the facts tending to prove such combination, of late date, had come to the knowledge of the defendant.

SAME.—*Misconduct of Jury.*—During the progress of a trial upon a charge of murder, two of the jurors, over the objection of the defendant, took, in writing, notes of the evidence, and persisted therein, although directed by the court not to do so.

Held, that this was such misconduct on the part of the jury as entitled the defendant to a new trial.

APPEAL from the Franklin Circuit Court.

PETTIT, J.—The appellant was indicted for murder in the first degree, for killing one Thomas Harrison, in the Dearborn Circuit Court; and, on his application, the venue was changed to the Franklin Circuit Court. Trial by jury on a plea of not guilty; verdict of guilty of murder in the first degree; motions for a new trial and in arrest of judgment were overruled; and judgment of death was rendered on the verdict.

1. It is claimed that the court had no jurisdiction in the case, and erred in refusing to arrest the judgment.

2. That the court erred in giving, and refusing to give, instructions asked.

3. That the court erred in admitting illegal evidence, and rejecting legal evidence.

We will first consider the admission of evidence against the appellant, alleged and thought to be illegal, and improperly admitted.

After Dr. Kyle had been examined for the State, and Baily (indicted with the defendant for the murder of Harrison) for the defense, Kyle was recalled by the State, and was asked this question: "At the time you and Harrison started up the hill, and on your way up the hill to the point where the

meeting with Cheek and Baily occurred, what was the expressed purpose of Harrison for turning back with you?"

Objected to, and not allowed to be answered till the following questions were put by the defendant and answered by the witness:

1. "Please state whether, at the time this conversation took place, the defendant and Baily, or either of them, was in sight or hearing of yourself and Mr. Harrison, or either of you." Answer: "They were not in sight, and they could not hear an ordinary conversation."

2. "What is your best judgment, considering the distance between yourself and Mr. Harrison, on the one part, and the defendant and Baily, on the other part, as to whether the defendant and Baily, or either of them, heard the beginning of the conversation between you and Mr. Harrison, when you met Mr. Harrison, or any of it?" Answer. "My impression is, they did not hear it; we spoke in ordinary conversation."

After this, the witness was allowed to answer the original question, which he did thus: "Mr. Harrison spoke thus: 'Doc, I am glad you have come; there are two ruffians going up the road, and they have threatened to take my life; they have gone to my house, and I want you to go back with me.'"

The evidence, here and elsewhere in the record, shows that neither the defendant nor Baily did hear or could have heard this statement, and that the parties were not in sight or hearing of each other, when speaking in the usual tone of voice. In fact, it is made clear that this statement was not heard by or known to either Cheek or Baily. This evidence was not rebutting to any question asked by the defendant, nor to any testimony given on his behalf. Was it *res gestæ?* We think not. Bouvier says, "When it is necessary, in the course of a cause, to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said at the time of doing it is admissible evidence as a part of the *res gestæ*, for the purpose of showing its true character."

We think the books may be searched without success, to find a case where the statements of a murdered man, made before he came in sight or hearing of his slayer, can be given in evidence against the accused on his trial.

Was this evidence detrimental to the accused? We think so. It was well calculated to make or induce the jury to believe that the killing was from premeditated malice, and not from sudden, hasty transport, or momentary passion; and might, and probably did, induce the jury to find a verdict of murder in the first degree (the penalty for which is death), instead of a lower degree of the offense.

The case must be reversed for this error, and it is hardly necessary to notice the other questions; but we will refer to one or two other points raised.

Were the instructions rightly given and refused?

We have carefully examined, and are satisfied with them. Indeed, they are quite as favorable to the defendant as he had a right to ask. Nor did the court commit any error in refusing to give instructions asked by the appellant.

There was some evidence given, and much more offered, but rejected by the court, tending to prove that the deceased, who was the father of the defendant's wife, was and had been in an unnatural combination with one Clem, to induce the defendant's wife to leave him and elope with Clem. This evidence, so far as the acts, sayings, and doings of Harrison, of a late date, had been communicated, or come to the knowledge of the defendant, should have been admitted. This evidence would have tended to show the state of Cheek's mind, and a reason for his being so highly frenzied upon his meeting the deceased, as testified to by Dr. Kyle; and it would have tended to show that the deceased might have used the abusive words, and made the threats to Cheek, testified to by Baily, and thereby tended to mitigate the rigor of the verdict.

Two of the jurors, over the objection of the defendant, and after the court had told them they must not do so, persisted in writing down notes of the evidence. This disobe-

dience of the order of the court was a gross violation of, and contempt for, the authority of the court, and was misconduct for which the jurors might have been severely punished, and of itself would entitle the defendant to a new trial. It was well calculated to divert the attention of the jurors, while they were busy, pencil or pen in hand, from the evidence, as it would naturally be progressing while such notes were being made. The juror is to register the evidence, as it is given, on the tablets of his memory, and not otherwise. Then the faculty of the memory is made, so far as the jury is concerned, the sole depository of all the evidence that may be given; unless a different course be consented to by the parties, or the court. Burrill Cir. Ev. (2d ed.) 108, and note (a). The jury should not be allowed to take the evidence with them to their room, except in their memory. It can make no difference whether the notes are written by a juror or by some one else. Jurors would be too apt to rely on what might be imperfectly written, and thus make the case turn on a part only of the facts.

At the proper time, there was a motion made in arrest of judgment; and under this motion it is insisted that the Franklin Circuit Court had no jurisdiction of the cause, because the transcript of the Dearborn Circuit Court does not show that a grand jury was empanelled at the term at which the indictment was found, otherwise than as the same appears in the indictment itself; and because the transcript does not show who delivered the transcript and original papers from the Dearborn Circuit Court to the clerk of the Franklin Circuit Court. We have not come to a conclusion on this question; nor do we deem it of importance that we should, as the case must be reversed, and the defects, if any there are, can be cured before another trial.

The judgment is reversed, with instructions to the court below to give the appellant a new trial.

J. Schwartz, for appellant.

B. W. Hanna, Attorney General, and *M. M. Ray*, for the State.

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DAVIS v. THE STATE.

WITNESS.—*Expert.*—*Insanity.*—Physicians who are engaged in practice, and have given the subject of medical jurisprudence some attention, by reading and by attending lectures, may be examined as experts on the subject of insanity.

SAME.—*Evidence.*—The extent of a witness's acquaintance with the subject about which he testifies as an expert may always be inquired into, to enable the jury to estimate the weight of his evidence.

SAME.—*Court.*—*Jury.*—Whether a witness is competent to testify at all as an expert, is a question for the court; but after he has been allowed to testify, the weight of his evidence is a question for the jury.

SAME.—*Hypothetical Case.*—*Practice.*—If there is no dispute as to the facts on which a witness is to base his opinion as an expert, it is proper to require that the question propounded shall embrace them all, and that the witness shall take them all into consideration in giving his answer. But if the facts are in dispute, the question propounded may be based upon the facts which the evidence tends to prove; and the jury may decide ultimately whether the facts are established by the evidence or not.

SAME.—When a witness examined as an expert expresses an opinion based on facts assumed by the party introducing him to have been proved, or upon a hypothetical case put by such party, then the other party may cross examine the witness by taking his opinion based on any other set of facts assumed by him to have been proved, or upon a hypothetical case.

MISCONDUCT OF JURY.—*Intoxicating Liquor.*—In a criminal cause, after the jury had been charged by the court and put in the care of a bailiff to consider of their verdict, the bailiff went with two of the jurors to a liquor and billiard saloon, where other persons were drinking and playing billiards, and procured for each of the jurors a drink of brandy, ginger wine, nutmeg, and sugar, which they drank, and one of them paid for; and it was not shown where the other jurors were at the time said two were absent with the bailiff at the saloon; and the transaction was unexplained, except that the bailiff asked the saloon keeper when he called for the drinks, if he could not fix up something for the jurors for the diarrhœa.

Held, that this was good cause for setting aside a verdict rendered by said jury against the defendant and granting him a new trial.

APPEAL from the Clinton Circuit Court.

DOWNEY, C. J.—This was an indictment against the appellant for murder in the first degree. Plea of not guilty. Trial by jury; verdict of guilty; motions for a new trial and in arrest of judgment overruled; and judgment that the defendant be hanged.

Several errors are assigned, but they are all expressly waived in the brief of appellant's counsel, except that which alleges the improper refusal of the circuit court to grant a new trial.

Two physicians were introduced and examined, on behalf of the State, as rebutting witnesses on the subject of insanity. It is urged by the defendant that they are not shown to be sufficiently conversant with insanity to entitle them to be regarded and examined as experts. One of them had been practicing his profession for fifteen, and the other for twenty-five, years, and they had each given the subject of medical jurisprudence some attention, by reading works on the subject and by attending lectures.

We think they were competent to testify on the subject, as experts. "Insanity being deemed a disease, it is believed to be the general custom of our American judges, throughout the country, to accept of all educated and practicing physicians as experts, whether they have given special attention to the disease of insanity or not." 1 Bishop Crim. Law, sec. 544. The witnesses in this case, however, had, in addition to their medical studies, given some attention to the subject of insanity. See *Baxter* v. *Abbott*, 7 Gray, 71. The extent of the witness's acquaintance with the subject may always be inquired into, to enable the jury to estimate the weight of his evidence. Whether he is competent to testify at all as an expert, is a question for the court. But after he has been allowed to testify, the weight of his evidence is a question for the jury.

The prosecuting attorney was allowed to enumerate certain facts, which he assumed were established by the evidence, and upon them to ask each of these witnesses his opinion as to whether they indicated soundness or unsoundness of mind in the defendant. Counsel for the defendant objected to this, insisting that all the facts bearing on the subject were not enumerated in the question. But the court allowed the question to be answered. If there is no

dispute as to the facts on which the witness is to base his opinion, as an expert, it is then proper to require that the question shall embrace them all, and that the witness shall take them all into consideration in giving his answer. But if the facts are in dispute, this course is impracticable. In such a case, it seems to us proper to allow counsel to base their questions upon the facts which the evidence tends to prove, and let the jury decide, ultimately, whether they are established by the evidence or not.

After the prosecutor had propounded to these witnesses the question as to the sanity or insanity of the defendant, based on the facts assumed by him to have been proved by the evidence, and got an answer thereto, the defendant's counsel propounded to the witnesses the same question based on facts which they assumed to have been proved by the evidence, and claimed an answer thereto. To this the prosecutor objected, on the ground that it was not a cross examination, and the objection was sustained by the court. This ruling was wrong. We think that when such a witness has expressed an opinion based on facts assumed by the party introducing him to have been proved, or upon a hypothetical case put by such party, the other party may cross examine him by taking his opinion based on any other set of facts assumed by him to have been proved by the evidence, or upon a hypothetical case put by him. The witness having expressed an opinion as to the sanity of the party, it is extremely important to such party to go fully into the reasons for such opinion; and he should be allowed to call the attention of the witness to any and every view of the facts which will tend to test the correctness of such opinion. The witnesses having been called and examined as rebutting witnesses, this right of cross examination was of the utmost importance to the defendant, as he could not introduce the persons as his own witnesses at that stage of the case, or bring others to overcome their evidence.

In *The People* v. *Thurston*, 2 Parker Cr. 49, such a cross examination of a medical witness as that demanded in this

case was allowed, without objection. In *Huckleberry* v. *Riddle*, 29 Ind. 454, this court had occasion to consider the subject of cross examination, and, among other things, said: "A cross examination is worth little, if thereby false impressions, created by the examination of the party calling the witness, may not be corrected by it, by showing additional facts connected with the same subject, in the light of which inferences, otherwise legitimate and natural, would be prevented."

After the jury were charged and put in the care of a bailiff, that they might consider of their verdict, the bailiff, with two of them, went to a liquor and billiard saloon, where other persons were drinking and playing billiards, and the bailiff procured for each of them "a drink of brandy, ginger wine, nutmeg and sugar," which they drank, and which was paid for by one of them. The saloon-keeper swears, in his affidavit, that the bailiff asked him if he could not "fix up something for said jurors for the diarrhœa." The evidence does not show where the other jurors were at the time when the two with the bailiff were in the saloon. There was no attempt to show that the jurors were really suffering with diarrhœa, how much liquor they drank, what effect it had upon their fitness to deliberate on the case, where the other jurors were, or in any other way to break the force of the showing made by the defendant.

The bailiff, we may presume, had been sworn in the usual form, to take charge of the jury, and keep them together without meat or drink, water only excepted, &c. The jurors had taken upon them an oath, well and truly to try the cause, &c., and had been solemnly sent out to deliberate upon questions involving the life of an unfortunate fellow-being. If misbehavior, such as that shown by the affidavits, and which is without attempted palliation or justification, should not be regarded as sufficient to set aside the verdict, it would be a stigma upon the law and a disgrace to the courts. We do not mean to say that the court should enter upon the question as to how far such conduct was or was

not excusable or innocuous. It will be time to decide that question when it shall come up. In this case it does not arise. We concede that on this point the authorities are not uniform. But as to the sufficiency of such misbehavior unexplained, to set aside the verdict, the authorities are abundant and satisfactory.

Without deciding the question, this court intimated this opinion in *Creek* v. *State*, 24 Ind. 151. In *Ryan* v. *Harrow*, 27 Iowa, 494, a civil cause, the court, after reviewing the decisions on the point, held, for the second time, the first having been in a criminal case, that the drinking of intoxicating liquor by one or more of the jurors, during the discharge of their duties as such, constituted sufficient ground for setting aside the verdict and ordering a new trial. The learned judges refused to enter into any inquiry as to how far, or whether at all, the jurors became intoxicated. They use this language: "The view we take of the case will relieve us of the duty of determining whether the charge of intoxication is sustained by the record. And we are glad to escape so unpleasant an investigation, which might result in convincing us that the administration of the law in our State has been disgraced by the drunkeness of those appointed to decide, in a court of justice, upon the rights of their fellow-citizens. We had hoped that such things were of the past, and would only be remembered as rare instances existing in the traditions of frontier days." In *The People* v. *Douglass*, 4 Cow. 26, and *Brant* v. *Fowler*, 7 Cow. 562, one a criminal and the other a civil case, the court held the mere act of drinking the liquor by the juror as sufficient to set aside the verdict. In the latter case, the juror, as in this case, took the liquor for diarrhœa, showing the prevalence of that complaint among jurors.

It is true that in *Wilson* v. *Abrahams*, 1 Hill, 207, it is held, in modification of the cases in Cowen, that the mere fact of drinking spiritous liquors by a juror, during the progress of a trial, is not, *per se*, sufficient to warrant the setting aside of the verdict.

In *The State* v. *Bullard*, 16 N. H. 139, the court held the mere fact of using the liquor to be sufficient to annul the verdict, saying, "We are of the opinion that the use of stimulating liquors by a jury deliberating upon a verdict in a criminal case, without first showing a case requiring such use, and having leave of the court for that purpose, is a sufficient cause for setting aside a verdict found against the prisoner, in such circumstances, whether the use was an intemperate one or otherwise."

Such is the rule in the Supreme Court of Texas. In *Jones* v. *The State*, 13 Texas, 168, the learned judge who delivered the opinion of the court, after speaking of the contrary rule, says, "We, however, with due respect for the judges who have maintained this doctrine, are constrained to depart from their opinion; and we believe that the view they have taken of the effect of ardent spirits on the feelings, and also on the mind, has been superficial, and not at all philosophical. Every day's experience must satisfy us that it is impossible to lay down a rule as to how much can be drank without impairing the qualification of a juror for discharging the trust confided in him. Its effects have been well described by Scotland's most popular bard:

> 'Inspiring, bold John Barleycorn!
> What dangers thou canst make us scorn!
> Wi' tippenny we fear nae evil;
> Wi' usquebae, we'll face the devil.'

"Yes, it is but too true, that it will make a man bold and reckless, not only of consequences, personally, but also of the rights of those whose life and most valuable interests, property and reputation are at stake; and its effect is so very different on different men, that it would be dangerous in the extreme to attempt to lay down any rule by which it could or should be determined whether a juror had drank too much or not; and the only safe rule is to exclude it entirely."

In *Pelham* v. *Page*, 6 Ark. 535, it is held, that the circulation of spirituous liquors among a jury, while sitting as such,

even with the consent of the parties, is cause for reversing the judgment; but that if the evidence is before the Supreme Court, and that shows that the verdict was right, it will not be set aside.

In *Gregg* v. *McDaniel*, 4 Harring. Del. 367, a verdict was set aside on the ground that intoxicating liquors had been introduced into the jury room and used, pending their deliberations.

In *The Commonwealth* v. *Roby*, 12 Pick. 496, SHAW, C. J., after an examination of the authorities, says: "The result of the authorities is, that where there is an irregularity which may affect the impartiality of the proceedings, as where meat and drink or other refreshment has been furnished by a party, or where the jury have been exposed to the effect of such influence, as where they have improperly separated themselves, or have had communications not authorized, there, inasmuch as there can be no certainty that the verdict has not been improperly influenced, the proper and appropriate mode of correction or relief is by undoing what is thus improperly, and may have been corruptly done; or where the irregularity consists in doing that which may disqualify the jurors for proper deliberation and exercise of their reason and judgment, as where ardent spirits are introduced, there it would be proper to set aside the verdict, because no reliance can be placed upon its purity and correctness. But where the irregularity consists in doing that which does not and cannot affect the impartiality of the jury, or disqualify them for exercising the powers of reason or judgment, as where the act done is contrary to the ordinary forms, and to the duties which jurors owe to the public, the mode of correcting the irregularity is by animadversion upon the conduct of the jurors or of the officers, but such irregularity has no tendency to impair the respect due to such verdict." See the authorities there cited, and also the *The State* v. *Prescott*, 7 N. H. 287.

The statute provides that the court may grant a new trial for the following causes, or any of them:

First, when the jury has received any evidence, paper, or document, not authorized by the court, or the court has admitted illegal testimony, or for newly discovered evidence.

Second, when the jury have separated without leave of the court, after retiring to deliberate upon their verdict, or have been guilty of any misconduct tending to prevent a fair and due consideration of the case.

Third, when the court has misdirected the jury in a material matter of law.

Fourth, when the verdict is contrary to law or evidence; but not more than two new trials shall be granted for this cause alone. 2 G. & H. 423, sec. 142.

We need not decide, in this case, whether the separation of the jury alone, would imperatively require us, under this statute, to grant a new trial.

The judgment is reversed, and the cause remanded.

J. Claybaugh and *R. P. Davidson*, for appellant.

B. W. Hanna, Attorney General, for the State.

WHITNEY *v.* THE STATE.

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RAPE.—*Indictment.*—An indictment for rape charged, that the defendant, on, &c., at, &c., "did then and there, in and upon" A. B., "a woman, forcibly and feloniously make an assault; and her, the said" A. B., "unlawfully, forcibly, and against her will, feloniously ravish and carnally know, contrary to the form of the statute," &c.

Held, that the indictment was not bad because the word "did" was not repeated before the words "ravish and carnally know."

SAME.—*Venue.*—In a prosecution for a rape, the record showed the trial to have occurred in Indianapolis, Marion county, Indiana, and the evidence as to the place where the crime was committed was, that "it was in Indianapolis, in this county."

Held, that the venue was sufficiently shown.

SAME.—*Evidence.*—Where on the trial of an indictment for a rape, the evidence

showed that the prosecutrix was of doubtful character; that she did not presently discover the offense, nor indeed at all until interrogated about it; and she remained with the defendant afterwards, and the party accused did not flee; and the prosecutrix was uncorroborated by any material evidence; the place of the crime being such that it was possible she might have been heard, and she made no outcry; and there were other circumstances of doubt;

Held, that the evidence was insufficient.

APPEAL from the Marion Criminal Circuit Court.

DOWNEY, C. J.—This was an indictment for rape, alleging that the defendant, "on the 27th day of December, 1870, at and in the county of Marion, and State aforesaid, did then and there, in and upon America Virt, a woman, forcibly and feloniously make an assault; and her, the said America Virt, then and there, unlawfully, forcibly, and against her will, feloniously ravish and carnally know, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana."

A motion to quash the indictment was made and overruled. The defendant pleaded not guilty, on his arraignment. There was a trial by jury; verdict of guilty, fixing the punishment at eleven years imprisonment in the state prison. A motion for a new trial and also a motion in arrest of judgment were overruled, and judgment was rendered on the verdict.

Several errors are assigned, which we will proceed to examine.

The motion to quash and also that in arrest of judgment call in question the sufficiency of the indictment. It is urged that the indictment is bad, because the word "did" is not repeated before the words "ravish and carnally know." We think the indictment is good without thus repeating that word. It is all one sentence. The several acts are stated conjunctively, and the verb "did," where it occurs, must be held to apply to all of them.

The next point made is, that the court allowed a leading question, on a material point, to be put to, and answered by, the prosecutrix, over the defendant's objection. The question was suggestive of the answer desired, and might have

been answered by yes or no. We are not able to see any thing in the case which authorized a departure from the rule which prohibits the asking of leading questions on the direct examination.

The next point made is, that the evidence was not sufficient to sustain the verdict of the jury; and, first, it is urged that the evidence does not show when the crime was committed. The evidence of the prosecuting witness was as follows: "Don't know what month it was in; it was in this year, I believe; was after new-year's." If this was all the evidence, it would not show that the crime was committed before the indictment was found. But it is not all. The indictment was found and returned into court January 12th, 1871. The trial was commenced on the 25th and concluded on the 26th day of the same month and year. Mrs. Nutting stated that the prosecutrix came to her house "on the Wednesday before new-year's last," and that the defendant brought her there. It is shown by other evidence, that she went to Mrs. Nutting's in one or two days after the occurrence referred to in the indictment. This sufficiently shows that the act was committed within the period of the statute of limitations and before the indictment was found.

It is also urged that the venue was not proved, by showing that the act was perpetrated in Marion county, Indiana. The prosecutrix testified on this point: "It was in Indianapolis, in this county." As the trial was being held in Indianapolis, in Marion county, Indiana, as we know from the record, the statement that it was "in this county," seems to us sufficient.

It is also urged that the evidence, while it may prove sexual intercourse between the parties, does not prove that such intercourse was forcible and against the will of the prosecutrix, as required by statute, to constitute the crime of rape, and as alleged in the indictment.

We think the case was made out in a very unsatisfactory manner. The defendant was the keeper of two restaurants. The alleged rape was committed in a back room at one of

these places. At the time, a number of persons were in an adjoining room, and testify nothing of it; nor does the prosecutrix pretend that she made any outcry. She stayed at this same place, with the defendant, the night following and the next night. She made no disclosure to any one of what had happened until a day or two after the last night mentioned, and then only in answer to interrogatories put to her by a female at whose house she had gone to live. It was testified by others, and she admitted, that she had been guilty of indecent and lewd behavior towards the defendant before the occurrence referred to.

In prosecutions for this crime, the best judges of ancient and of modern times have laid down certain tests by which to be governed in ascertaining the truthfulness of the party preferring the charge. They concur in saying that her evidence should be carefully considered; and if the witness be of good character; if she presently discovered the offense, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances which will give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by the testimony of others; if she concealed the injury for any considerable time after she had an opportunity to complain; if the place where the act was alleged to have been committed were such that it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned. 1 Whart. Crim. Law, sec. 1149; 4 Bl. Com. 213. In this case the prosecutrix was of doubtful character. She did not presently discover the offense, nor, indeed, at all, until interrogated about it; the party accused did not flee; the prosecutrix is uncorroborated by any material evidence; the place where the crime is alleged to have been committed was such that it was possible she might have been heard, and she made no outcry. There are other circumstances which tend to show that the defendant was wrongfully convicted. We think, taking all

the circumstances together, that he ought to have had a new trial granted him.

The judgment is reversed, and the cause remanded. The clerk is directed to certify to the warden of the prison to return the defendant to the jail of Marion county.

W. W. Leathers, for appellant.

B. W. Hanna, Attorney General, for the State.

DRULY *v.* HUNT.

VOLUNTEER SOLDIER.—*Credit to Township.—Evidence.*—Where the question submitted to the jury was, whether a person entering the military service of the United States under a call for volunteers had been credited to a particular township;

Held, that the muster-roll containing his name as a resident of that township was not sufficient evidence of the fact that such township had received the credit.

SAME.—*Bounty,—Collateral Promise.*—An instruction to the jury, that where one promised to guarantee or warrant the pay to a volunteer which had been promised to be paid by a public meeting, his promise was only collateral and not binding on him, unless in writing, was held proper in a case, where if the evidence showed any contract, it had a tendency to show that it was thus collateral.

APPEAL from the Wayne Common Pleas.

WORDEN, J.—Hunt, the appellee, sued Druly, the appellant, and others, on an alleged contract to pay him two hundred dollars in consideration of his entering into the military service of the United States, on the call of the President for five hundred thousand men, and being credited to Boston township, in said county of Wayne. Issue, trial, verdict, and judgment for the plaintiff as against the appellant, a new trial having been refused him.

On the trial, the appellee, in order to prove a compliance on his part with the alleged contract, offered in evidence the

original muster-roll, on the certificate of the adjutant-general of the State, showing that Hunt was mustered into the service to serve three years from the 7th of March, 1864, and that he was a resident of Boston township, in said county of Wayne. Objection was made to this paper, but the objection was overruled, and the defendant excepted.

We are not entirely harmonious in our views in respect to the propriety of admitting this instrument on the certificate above mentioned; we therefore decide nothing in respect to it, as the judgment must be reversed upon other grounds.

The court charged the jury as follows, viz.:

"4th. That he" (the plaintiff) "was mustered into the service of the United States to the credit of Boston township, must be proved by the original muster-roll or a properly exemplified copy thereof. Such muster-roll must show the residence of the mustered recruit. And if the muster-in-roll exhibited you shows that the residence of plaintiff, at the time of muster, was Boston township, Wayne county, Indiana, it would warrant you in finding that the plaintiff was mustered into the United States service to the credit of said township."

This charge was duly excepted to by the defendant, and we think it was not the law. It is matter of history, that in filling the various calls for men as they were needed during the late civil war, recruits were generally, if not universally, credited to whatever township or county they chose, without reference to their place of residence, depending much upon the bounty offered or inducements held out to them. The charge implies that there was a presumption that the recruit was credited to the township in which he resided, otherwise the jury would not be warranted in finding that he was credited to Boston township from the fact of residence therein. We are of the opinion that there was no presumption on the subject, either one way or the other, and therefore, that the jury were not warranted in finding that Hunt was credited to Boston township because he resided therein, and that such

residence was shown in the muster-roll. The court, as we think, erred in giving the charge.

The following charge was asked by the defendant, and refused:

"If Druly promised to guarantee or warrant the pay to plaintiff which had been promised to be paid by a public meeting, his promise was only collateral, and not binding on Druly unless in writing."

Our statute provides, that no action shall be brought "to charge any person upon any special promise to answer for the debt, default, or miscarriage of another," unless the contract shall be in writing. 1 G. & H. 348.

We think the charge in question, fairly construed, means that if a body of people at a public meeting had promised the plaintiff the money for which he sues, and if the defendant merely guaranteed or warranted that the money thus promised should be paid, his contract was collateral, and not binding unless in writing.

Thus construed, the charge expressed the law, and should have been given. The charge was applicable to the case, inasmuch as the evidence, if it showed any contract on the part of the defendant, had a tendency to show that it was thus collateral. It was for the jury to say, under proper instructions, whether the promise of the defendant, if he made any, was original or collateral.

The judgment below is reversed, with costs, and the cause remanded.

W. A. Bickle, for appellant.

C. C. Binkley, for appellee.

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THE INDIANAPOLIS, BLOOMINGTON, AND WESTERN RAILWAY COMPANY *v.* CARR, Administrator.

RAILROAD.—*Death Caused by Negligence.—Instruction.—Evidence.*—In an action against a railroad company for negligently causing the death of A., it appeared from the evidence, that A. and others in the employment of a union railway company were at work at a certain point on the railroad track of said union company over which trains could pass at that point; that a train of cars owned and run by defendant was backing at the time; that the bell of the locomotive was ringing; that there were four or five cars in the train and no method of communicating with the engineer from the rear of the train; nor was there any brake in working order on the car farthest from the locomotive, although a brakeman was on the rear end of the car, the locomotive being at the other end of the train; nor was any person in advance of the train to warn others of its approach. The locomotive was in charge of the fireman, the engineer being absent to procure a drink. The other persons employed with B. at work on the track stepped off, and some one called to him, "look out," when B., instead of stepping back, stepped forward, and was struck and killed. The fireman and one brakeman were the only persons in charge of the train. This instruction was asked and refused: "If, at the time deceased was killed, it was his duty to be engaged upon the track at that place, and he might have seen the approach of the train by exercise of reasonable care, as by looking up, then the failure to do so, if he did so fail, was negligence on his part; and if such negligence contributed to his injury, then the jury should find for the defendant."

Held, that there was no error in this ruling.

Held, also, that this evidence was sufficient to sustain a finding against the railway company.

APPEAL from the Marion Common Pleas.

DOWNEY, C. J.—This action was brought by the appellee against the appellant, and it was alleged in the complaint that the Indianapolis, Crawfordsville, and Danville Railroad Company was, on the 20th day of September, 1869, using, operating, and running a certain locomotive, together with a train of cars thereto attached, on the Union track, in the city of Indianapolis, Indiana, at a point on or near Delaware street, in said city; and that since said 20th day of September, 1869, said Indianapolis, Crawfordsville, and Danville Railroad Company, had consolidated and entered into articles of consolidation with the Danville, Urbana, Bloomington, and Pekin Railroad Company, whereby said two corpo-

rations had become one corporation, known by the name, style, and description of the defendant herein, and by means thereof, said defendant had succeeded to all the rights and franchises of both of said corporations, and also become responsible for all the liabilities before then existing or accrued against either and both of said corporations. And that on the said 20th day of September, 1869, Patrick Gill, then in life, was in the service, and was performing work and labor as an employee of the Union Railway Company, and was on said day engaged at his daily labor on said Union track, at a point on and near Delaware street, in the city of Indianapolis; and that while so at work, and without any fault or negligence on his part, the agents and servants of the said Indianapolis, Crawfordsville, and Danville Railroad Company, while engaged in running and operating a locomotive and train of cars owned by, and belonging to, said Indianapolis, Crawfordsville, and Danville Railroad Company, on, upon, and along said Union track, so carelessly and negligently run and operated said locomotive and train, on, over, and along said track, that they did carelessly and negligently run said locomotive and cars against, on, and upon him, the said Patrick Gill; by means whereof he, the said Patrick Gill, was then and there instantly killed. And plaintiff says that said Patrick Gill left surviving him his widow, Bridget Gill, and no children; that the said Bridget was wholly dependent upon him, the said Patrick, for means of support; and that by means of the provisions of the statute in such case made and provided, a right of action had accrued in favor of the plaintiff for the sole use and benefit of her, said Bridget Gill, as the surviving widow of said Patrick Gill, to have and recover the sum of five thousand dollars; and that said defendant, by reason of the consolidation aforesaid, was liable and responsible for the same; and that he, said plaintiff, for the use aforesaid, had a right of action against said defendant, by reason of the premises, for said sum of five thousand dollars; and he, for the use aforesaid, demanded judgment for said amount.

A demurrer to this complaint was filed and overruled, of which action there is no complaint. Issue in fact was then formed by a traverse of the complaint. The case was tried by a jury, and a verdict rendered for the plaintiff for nine hundred and fifty dollars.

A motion for a new trial was made by the defendant, for the reasons, that the verdict was not sustained by sufficient evidence, was contrary to law, and because the court refused to give instruction No. 5, asked by the defendant. This motion was overruled, the defendant excepted, judgment was rendered, and thirty days were given in which to file the bill of exceptions. The bill of exceptions was filed within the time limited, and professes to set out all the evidence given in the case.

The only error assigned is the refusal of the court to grant the new trial.

It appears from the evidence that Gill and others were at work repairing the Union track, but the repairs were such as did not prevent trains from passing over the road at that point. The train in question was backing. Those who were working with Gill got out of the way. He was standing on or near the south rail at work. The bell of the locomotive was ringing. There were four or five cars in the train. Some one called out, "look out," when Gill, instead of stepping back, for some cause stepped forward on the track, and was struck by the cars, knocked down, and some of the cars passed over him, killing him almost immediately. A brakeman was on the rear end of the car farthest from the locomotive, but the brake on that car was out of order. The engine was at the other end of the train, and there does not appear to have been any means of communicating with the engineer, so as to stop the train or prevent accidents. No one went in front of the backing train to warn persons of danger or to clear the way. The engineer had left his engine, and gone to get a drink, leaving the engine in the hands of the fireman, who had charge of it at the time of the accident. He was not an engineer. The fireman and

one brakeman were all the men on the train at the time of the accident.

We would not be warranted, in this state of facts, to say that the evidence was not sufficient to justify the verdict of the jury.

The instruction asked and refused was as follows: "5. If, at the time the deceased was killed, it was his duty to be engaged upon the track at that place, and he might have seen the approach of the train by exercise of reasonable care, as by looking up, then the failing to do so, if he did so fail, was negligence on his part, and if such negligence contributed to the injury, then the jury should find for the defendant."

We think this instruction was correctly refused. It asserts that if the deceased might have seen the train by looking up, it was his duty to do so; and if he failed to look up, he was guilty of negligence, and the action could not be sustained. The evidence shows that the deceased did look up, but we think it most probable that when he did so, the train was so close upon him that, in the confusion of the moment, he stepped in the wrong direction, and thereby lost his life. He is not to be charged with negligence because he did not, when suddenly startled by the cry of danger, or by the near approach of the train, do exactly what one not exposed to such peril might think he might or ought to have done. When a train is moving forward in the ordinary way, with the locomotive in front, a skilful and careful engineer, with a competent number of brakemen and other assistants, the train moving at the rate of only three or four miles an hour, as was the case here, there cannot be much danger to life, even in passing through or across the streets of a populous city. But when the train is backing, at a point where people are passing and engaged in work on the track of the road, the engine, as in this case, being at the rear end of the train as then moving, common prudence and ordinary care would seem to require more diligence to avoid damage to persons

and property than was used in this case. The engineer was off his train. There was only one brakeman. The brake or brakes were out of order. There were no means of communicating with the engineer. No one passed ahead of the train to clear the track or give notice of danger. We think the charge was rightly refused.

The judgment is affirmed, with costs, and five per cent. damages.*

J. E. McDonald, J. M. Butler, and *E. M. McDonald,* for appellant.

J. Hanna and *F. Knefler,* for appellee.

*Petition for a rehearing overruled.

DEWEESE *v.* CHEEK.

ACCORD AND SATISFACTION.—*Agreement.*—The plea of accord and satisfaction must allege that the thing the creditor may have agreed to receive of the debtor in satisfaction of the debt was received.

APPEAL from the Decatur Common Pleas.

WORDEN, J.—Suit by the appellee against the appellant upon an acceptance by the latter of an order or bill of exchange drawn upon him by Jacob Deweese in favor of the plaintiff. The abstract in the cause sets out the following answer, to which a demurrer was sustained, and this ruling constitutes the only supposed error complained of, there having been final judgment for the plaintiff, viz.:

"The defendant, further answering, says, that he did execute and accept the order in suit, but before it matured, and after its acceptance, he and said plaintiff, for a good and valuable consideration, contracted and agreed that it should be paid and satisfied by the payment to him of the sum of eighteen dollars and forty cents in cash, and the delivery to

the plaintiff of an order then and there held by this defendant, of which the following is a copy, viz.:

"'No. 35, Trustees' Office for Sandcreek township, $100. Decatur county, Indiana, November 22, 1865. This certifies that there is due, September 1st, 1866, John F. Deweese, from this township, one hundred dollars military. The draft of March 22d, 1865, payable as soon as there may be funds on hand. JOHN CHEEK,

'Trustee of Sandcreek Township.'

"That said defendant paid said plaintiff said sum of eighteen dollars and forty cents, and tendered him said order before the commencement of this suit; that said plaintiff received said eighteen dollars and forty cents, but refused to accept said order; that said defendant brings said order into court for said plaintiff in discharge of his agreement, and asks to be discharged with his costs."

This answer seems to be radically bad. It is a plea of accord without satisfaction. To make out the defense of accord and satisfaction, the thing to be taken by the creditor in satisfaction of the debt must have been received by him; otherwise the debt is not barred. This doctrine is elementary. 2 Parsons Con. 681, and note *e*; *Woodruff* v. *Dobbins*, 7 Blackf. 582.

The judgment below is affirmed, with costs.

C. Ewing, *J. K. Ewing*, *J. S. Scobey*, *B. W. Wilson*, and *E. R. Monfort*, for appellant.

W. Cumback, *S. A. Bonner*, *J. Gavin*, and *J. D. Miller*, for appellee.

THE INDIANAPOLIS, CINCINNATI, AND LAFAYETTE RAILROAD COMPANY *v.* WARNER.

RAILROAD.—*Action Against two Companies for Stock Killed.*—Where a complaint against two railroad corporations charged, that "the defendants by their

locomotives and cars then by them run upon their road, at said county and State, run over and upon one colt belonging to the plaintiff," &c.;

Held, that regarding the action as in the nature of a tort, it was sufficient to charge that the act was done by the defendants, without showing what relation they sustained to each other, and a recovery might be had against the one shown by the evidence to be liable; or that there might under the statute be a joint or several liability of the defendants as lessees, assignees, receivers, or as running or controlling a railroad.

SAME.—*Track Along Street.*—Where a railroad company has not the exclusive right of way, as where a railroad runs along, instead of across, a street or alley, and where others as well as the company have the right to pass in or along such street or alley, the company under such circumstances cannot legally construct fences or cattle-guards on or along its track, and is only liable for killing stock at such point on its track when guilty of negligence.

APPEAL from the Morgan Circuit Court.

DOWNEY, C. J.—This was a suit commenced before a justice of the peace by the appellee against the appellant and the Indianapolis and Vincennes Railroad Company, to recover the value of a colt alleged to have been killed by their locomotive and cars, then and there run upon their railroad, at said county and State, where the road was not fenced. There was judgment for the plaintiff before the justice of the peace, to be levied and made without relief from valuation laws. The defendants appealed to the circuit court, where they demurred to the complaint, which was then amended by the plaintiff. The demurrer was then refiled by the defendants to the complaint, assigning for cause that it did not state facts sufficient to constitute a cause of action. This demurrer was overruled, and there was then a trial by the court, and finding for the Indianapolis and Vincennes Railroad Company, and against the Indianapolis, Cincinnati, and Lafayette Railroad Company. The latter company made a motion for a new trial, assigning as reasons the "permitting the plaintiff, after he had submitted the cause, to open the same and introduce new evidence," and also that the finding of the court was not sustained by the evidence, and was contrary to law. This motion was overruled, and judgment rendered on the finding against the Indianapolis,

Cincinnati, and Lafayette Railroad Company, and in favor of the Indianapolis and Vincennes Railroad Company.

The objection to the complaint, urged in the brief of counsel for the appellant, is that it does not show "any consolidation of the two companies, that one is the lessee of the other, or anything to inform them, or either of them, of a joint or several liability to the plaintiff, except the allegation "their locomotive," "their railroad."

The complaint, as amended, states that "the plaintiff complains of the defendants, and says that on the — day of August, 1868, the said defendants, by their locomotive and cars, then by them run upon their road, at said county and State, run over and upon one colt belonging to the said plaintiff, and of the value of fifty dollars, and by so running over the same killed it. That at the time the same was so run over, the said road was not securely, or in any way, fenced in, at the point where said colt entered upon said road, and that the same was killed without the fault of plaintiff; to the damage of the plaintiff in the sum of fifty dollars, for which he prays judgment."

Regarding the cause of action as a tort, or in the nature of a tort, we think that it was sufficient to charge that the act was done by the defendants, without showing what relation they sustained to each other. The plaintiff may, in tort, sue all or any of the *tort-feasors*, and may recover against such as may be shown by the evidence to be liable. *Palmer* v. *Crosby*, 1 Blackf. 139. And it is provided by statute, "that lessees, assignees, receivers, and other persons running or controlling any railroad in the corporate name of such company, shall be liable, jointly or severally, with such company, for stock killed or injured by the locomotives, cars, or other carriages of such company, to the extent, and according to the provisions of this act." 3 Ind. Stat. 413.

The complaint, in this case, charges that the act was done by both corporations. How they were related to each other is matter which it may be important to show on the trial,

in order to make out the case. If it should turn out in evidence, for illustration, that the Indianapolis, Cincinnati, and Lafayette Railroad Company had leased, and was using the road of the Indianapolis and Vincennes Company, at the time and place, when and where the animal was killed, this would render both companies liable, under the section of the statute quoted.

The next question is as to the correctness of the ruling of the court in allowing the plaintiff to introduce new and additional evidence after the argument had commenced. We know it is somewhat annoying to the counsel, when they have, in argument, as was probably the case here, pointed out to the court wherein the evidence is insufficient, to have the court permit their adversary to avoid the consequences of such omission by allowing additional evidence; and perhaps it should not be allowed, except in case of surprise or excusable omission. But it is so far a matter in the discretion of the subordinate court, that this court has not, in any case, interfered. *Coats* v. *Gregory*, 10 Ind. 345; *Watt* v. *Alvord*, 25 Ind. 533.

The next question is as to the sufficiency of the evidence to support the verdict.

It appears from the evidence that at the southern boundary of the town of Martinsville, and constituting such boundary, there was an alley running east and west; that Main street and Jefferson street, running parallel, north and south, with only one tier of blocks between them, terminated, at their southern end, at this alley; that when the railroad in question was being constructed, Mitchell furnished a part of the land necessary by setting back his fence from the south side of the alley, making altogether a space of about thirty feet, including the alley; that the railroad was located and made near the center of this space, in part on the alley, and in part on the land given by Mitchell; that there was a fence along each side of this space, between Main street and Jefferson street, Mitchell owning the land on the south, and Taylor on the north, and each maintaining the fence on his

own side. Jefferson street terminated at the alley, but Main street continued on south of the alley and the railroad. The animal in question, and some others, were standing between the railroad and Mitchell's fence, near Main street, when the train approached from the west. Some of them ran down the continuation of Main street, south, while the others, including the colt which was killed, ran east; and the colt was soon afterwards found dead, at or near the southern termination of Jefferson street. There were no cattle-guards at the crossing of Main street, nor anything else to prevent animals from going upon the railroad from Main street to the point where the colt was killed. There is no evidence as to whether there were or were not, cattle guards at Jefferson street.

The material question is whether the railroad company was bound to have any other fence along its railroad, between Main street and Jefferson street, than was there, and whether they were required to have cattle-guards at Main street. In other words, were they bound to fence in their road at that point, or be liable for animals killed, without proof of negligence?

Counsel for the appellee insist, that in towns and cities, railroad companies are bound to fence their roads with the same care as without their limits, that the exception only extends to places where it is unreasonable or improper that the road should be fenced, whether within or without the corporate limits of towns and cities. This position may be correct as to those railroads which own, exclusively, the right of way in a town or city, in which they run, or through which they pass. In such a case it would, it seems to us, be possible for the company to fence in their road by making the required fences along the sides thereof, and the necessary cattle-guards to prevent cattle from going from the streets or alleys across which the road passes, upon the track of the railroad. But this case is not one of this character. There are cases where the railroad company has not the exclusive right of way, as where the road runs along, instead

of running across the street or alley, and where others, as well as such company, have the right to pass on and along such street or alley. In such cases it seems to us that the company is not required to, and cannot legally construct fences or make cattle-guards on or along its track. In the case under consideration, the railroad ran partly on the alley and partly on the land given by Mitchell to the company. We must presume that the alley was one on which the public had a right to travel, and which they had a right to use as well as the railroad company. The company could not erect a fence along the north side of the railroad without placing the same in the alley, and thus unlawfully obstructing the same. Nor could the company, for the same reason, construct cattle-guards across the railroad track, at the east edge of Main street, and run a fence from such cattle-guards to the fence of Taylor, on the line of the east edge of Main street, without unlawfully obstructing such alley. But it may be said that the animal in question having been on the south side of the railroad, and on the land given to the company by Mitchell, outside of the town limits, the company might have fenced there, and that it might have placed cattle-guards and a fence south of the railroad to Mitchell's fence, on the line of the east edge of Main street. But these would not inclose the road. They, united to Mitchell's fence, would only make a fence on the south side of the road, and produce danger instead of safety, while the north side would be entirely open.

We are not inclined to hold that the company was bound to make a fence on the south side of the road nearer to it than the fence of Mitchell. This fence was only twelve or fourteen feet from the railroad track, which would probably leave little enough space for convenience in operating and repairing the road. See *The Indianapolis, Pittsburgh and Cleveland Railroad Co.* v. *Irish*, 26 Ind. 268. Under the circumstances disclosed in this case, we do not see how the road, at the point in question, could legally have been

"fenced in, and such fence properly maintained by such company," &c., as contemplated by the statute.

There is some discrepancy in the evidence as to whether Mitchell's fence was standing, at the point designated, at the time the animal was killed or not. We incline to the opinion that it was; but it would not change our view if the fence was not then standing at that point.

The appellant contends that because the judgment before the justice of the peace was rendered without relief from valuation laws, and was, in this respect, unauthorized, the plaintiff was liable for costs from the time of filing the appeal bond, and a motion for judgment to this effect was made and overruled, to which the defendant excepted, and this is assigned for error. Counsel for the appellant have failed to satisfy us that this was erroneous. No authority for such an order has been furnished to us, and we do not recall any such authority.

The judgment is reversed, with costs, and the cause remanded.

S. P. Oyler and *D. W. Howe.* for appellant.

C. F. McNutt and *G. W. Grubbs*, for appellee.

Bishop, Administrator, *v.* Welch.

Administrator.—*Witness.*—In a suit where judgment is sought against the administrator of an estate, and the answer brings the defense within the exception of the statute relating to a case where an action is brought by an heir upon a contract made with the ancestor, the plaintiff is not a competent witness, unless called by the administrator or the court.

Evidence of Settlement.—Where a claim was filed against an estate for work and labor done, for money had and received by, and services and attendance upon, the deceased during his sickness; and the defense was that the work and labor and money and services were performed and paid under a valid contract; and under plea of set-off promissory notes were offered in evidence, given by the person presenting the claim to the decedent at various times

during the period for which he demanded compensation for labor and attendance, it was the duty of the court to instruct the jury that these notes were *prima facie* evidence of a settlement between the claimant and the deceased.

WITNESS.—*Admissions.*—The claimant was not a competent witness to disprove the making of admissions by him, testified to by a third party, that such a contract existed as was set out in the answer.

APPEAL from the Hamilton Common Pleas.

BUSKIRK, J.—The appellee filed in the court below a claim against the estate of William Bishop, deceased. The claim was for work and labor done and performed, personal property sold and delivered, money loaned and money had and received, and for personal attendance upon the deceased during his protracted sickness. A bill of particulars was filed. The claim amounted to three thousand one hundred and seventy dollars. The credits given amounted to sixteen hundred and sixty-eight dollars, leaving a balance due of fifteen hundred and two dollars. There was attached to the claim an affidavit as to its correctness. The administrator refused to allow the claim. It was transferred to the issue docket.

The appellant, as administrator of said estate, filed an answer in four paragraphs. 1. The general denial. 2. That there was a contract between the decedent and the plaintiff, by which plaintiff had obligated himself to keep, feed, clothe, and provide for the decedent and his wife, for and during their natural lives, everything that was necessary for their use, comfort, and enjoyment, and in consideration thereof the plaintiff was to have the use and enjoyment of the farm of the decedent during such period of time; that all the work done and money paid by the plaintiff, as set out in his claim, was done and paid under and in pursuance of the said contract. 3. Payment. 4. Set-off; with the plea of set-off was filed a bill of particulars. Among the items were several notes executed by the plaintiff to the decedent, at different times, but during the time for which the plaintiff claimed for services.

The cause was tried by a jury, resulting in a verdict for the plaintiff for eleven hundred and sixty-eight dollars and

forty-seven cents. A motion for a new trial was overruled, and judgment was rendered on the verdict. Various reasons were assigned for a new trial, and quite a number of errors are assigned; but two are insisted on in the argument, and they will be considered, and the others will be regarded as waived.

The first alleged error consists in the admission of illegal and incompetent evidence. The appellant, to sustain the allegations contained in the second paragraph of his answer, introduced one William F. Noble, who testified to a conversation between the decedent and plaintiff in reference to the contract relied upon. The evidence strongly tended to establish a contract. When the plaintiff came to his rebutting testimony, he offered himself as a witness to testify in reference to the conversation testified to by the said Noble and the making of the said contract. The court, over the objection of the appellant, permitted the plaintiff to testify in reference to such matters. The plaintiff was an incompetent witness, under two exceptions to the statute rendering parties competent to testify. This was a suit against an administrator upon a claim against the estate of the decedent, in which a judgment was sought against the administrator. The matters set up in the second paragraph of the answer brought the defense within the exception where an action was brought by an heir upon a contract made with the ancestor. It is quite clear that the appellee was an incompetent witness, and that the court erred in permitting him to testify. The plaintiff could have been rendered competent as a witness, if he had been required to testify either by the administrator or the court, but such was not the case in this action. The plaintiff offered himself as a witness, and claimed the privilege to testify as a matter of right.

The next error assigned is based upon the refusal of the court to instruct the jury as requested by the appellant. The appellant asked the court to charge the jury, that the giving of the notes by the plaintiff to the decedent, as alleged in the answer, and shown by the testimony, was *prima facie*

evidence of a settlement of accounts existing between the parties at the dates of giving such notes. We think the instruction should have been given. The execution of a note raises a presumption of a settlement, but this is not a conclusive presumption, but may be overcome by evidence showing that the claim sued upon was not included in the settlement, or that the note was given upon another and different consideration.

The judgment is reversed, with costs; cause remanded, with directions to the court below to grant a new trial, and for other proceedings, in accordance with this opinion.

J. O'Brien and *W. O'Brien*, for appellant.

D. Moss, for appellee.

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BAUGH *v.* BOLES.

GUARDIAN AND WARD.—*Surety.—Fraudulent Conveyance.*—A complaint alleged that A. was appointed guardian of certain minors, and the plaintiff became surety on his bond; that A. received money as such guardian and subsequently purchased real estate from B. and received a deed for the same which was not recorded; that thereafter becoming greatly involved in debt and not having sufficient means to pay the same, he destroyed the deed, and induced said B. to execute a new deed for said real estate to the infant son of A., for the express purpose on the part of A. of wronging, cheating and defrauding his creditors, of whom the plaintiff was one, out of their just rights and preventing the sale of said property to pay his debts; that the deed to the minor son of A. was without consideration except love and affection; that A. had left the State without paying his debts or paying over or accounting for the money received as guardian; that he still remained absent; that the plaintiff, to avoid suit on the bond as surety, paid the sum due to the wards, they being of age, which sum had not been repaid, but remained due; and the complainant asked to subject the land to sale to pay said indebtedness.

Held, that the complaint was not sufficient on demurrer, even admitting that the deed conveyed title to the infant, as the necessity for the sale of the land was not shown by an allegation of the want of other property in A. to satisfy the debt.

APPEAL from the Monroe Circuit Court.

DOWNEY, C. J.—This action was instituted by the appellee against the appellant and one Henry Baugh. The complaint alleges, in substance, the following facts: That said Henry Baugh was appointed guardian of certain minors, by the family name of Comman, on the 22d day of February, 1851, the plaintiff becoming the security on his guardian's bond; that on the 20th day of October, 1851, the said guardian received of money of his wards the sum of two hundred and seventy-five dollars and thirty-three cents; that afterwards said Henry Baugh purchased certain real estate of one Anderson, and received a deed therefor from him; that afterwards said Henry Baugh, being greatly involved in debt, and not having sufficient means to pay the same, and the deed executed to him not having been recorded, the said Henry Baugh, with the knowledge and consent of Anderson, destroyed said deed, and caused said Anderson to execute a deed for said land to said Walter Baugh, the infant son of said Henry Baugh, for the express purpose, on the part of said Henry Baugh, of wronging, cheating, and defrauding his creditors, of whom plaintiff is and was one, out of their and his just rights, and to prevent said lot from being applied to the payment of his just debts; that the deed to said Walter was without consideration, except love and affection; that after the execution of the deed to Walter, Henry Baugh left the State of Indiana without paying any of his debts or making settlement of said guardianship, or paying over or accounting for said money, and has not since returned; nor has he yet accounted for the same; that the plaintiff, to avoid being sued on said bond, the wards having become of age, paid them the sum of six hundred and eight dollars, being the amount due them from said Henry Baugh, as such guardian, which amount has not been paid to him by said Henry Baugh, but the same, and the interest thereon, remains due to him; wherefore he asks judgment for eight hundred dollars against Henry Baugh; that the deed to Walter Baugh be declared void, as against

the plaintiff; that the said real estate be ordered to be sold, and so much of the proceeds as necessary applied to the payment of his debts, and for other relief.

Walter Baugh, by his next friend, demurred to the complaint, on the ground that the same did not state facts sufficient to constitute a cause of action, which demurrer was overruled, and the infant, by his guardian *ad litem*, excepted; and this is the first error assigned.

Adopting the theory of the plaintiff, that the second deed from Anderson, upon the destruction of the first one, vested the title to the real estate in Walter Baugh; that that transaction was fraudulent; and that the action, so far as it concerns Walter, is brought to set aside that deed; then we think the complaint was defective, in not showing the necessity for resorting to this land in order to make the debt due to the plaintiff. It is not shown that Henry Baugh had not, and has not, property out of which the plaintiff's debt can be made, without interfering with this property conveyed to the infant. If he has, then there is no reason or equity for taking this away from the appellant. The nearest approach to such an allegation in the complaint is, that at the time of causing the deed to be made to Walter, Henry Baugh was greatly involved in debt, and had not sufficient means to pay the same. This does not sufficiently show the necessity for selling this land. "A man thus indebted may undoubtedly make a voluntary conveyance (or cause it to be done, we may add) that will be valid, as such a conveyance should not be attacked by creditors till after his other property is exhausted, and it proving sufficient for the payment of his debts, the voluntary conveyance should stand." *Law* v. *Smith*, 4 Ind. 56.

Walter Baugh, by his guardian *ad litem*, answered by denying each and every allegation of the complaint.

There was a trial by the court, finding for the plaintiff; a motion was made for a new trial and overruled, and final judgment was rendered for the sale of the real estate, &c.

The second error assigned is the refusal of the court to

grant a new trial, and this presents several questions. We need not examine these questions. We are satisfied to reverse the judgment on the insufficiency of the complaint. We will remark, however, that the record makes this recital: "Comes now the plaintiff, by his attorney, and files proof of publication as to the defendant Henry Baugh, and the said defendant, being three times called, comes not nor answers herein, but wholly makes default," &c.

Neither the notice nor the affidavit of its publication is in the record before us. The record does not show any process or the service thereof on the infant defendant. *Abdil* v. *Abdil*, 26 Ind. 287, and cases cited. The evidence justifies the inference that Henry Baugh was dead long before this action was commenced, as the witnesses swear he had not been heard of for eight or nine years, and that it was understood among his relatives that he had started home from California and had been lost at sea.

The judgment is reversed, with costs, and the cause remanded.

BUSKIRK, J., having been of counsel, was absent.

S. H. Buskirk, for appellant.

EVANS and Another *v.* BRADFORD.

PARTNERS.—*Sale of Interest.—Lien of Taxes.—Set-off.*—Where one partner in a firm sold his interest in a stock of goods belonging to the firm to his co-partners, receiving their promissory note therefor, and subsequently, to prevent a seizure and sale of the goods for delinquent taxes, which were a lien on the entire stock when said interest was so purchased, said co-partners paid off the amount of the taxes;

Held, that the partners who had so purchased said interest could set-off against a like portion of the sum due on the note, the amount of taxes so paid by them which constituted a lien on the interest so purchased.

APPEAL from Tipton Common Pleas.

BUSKIRK, J.—The appellee sued the appellants upon a

promissory note, executed by them on the 7th day of August, 1865, payable to the order of A. C. Davis, for the sum of $1,175, which was indorsed to the appellee by the original payee.

The appellants answered in four paragraphs. The appellee demurred to the first and replied in denial to the others. The demurrer was sustained and proper exception taken. The cause was, by the agreement of the parties, submitted to the court for trial, and resulted in a finding for the appellee. The court overruled a motion for a new trial, and rendered final judgment on the finding.

The first and principal error relied upon by the appellants for the reversal of the judgment is based upon the action of the court in sustaining a demurrer to the first paragraph of the answer.

The substantial averments in the first paragraph of the answer were these:

That Davis, Evans and McMillen were, on the first day of January, 1865, engaged as partners, in selling boots and shoes, in the city of Indianapolis, county of Marion, and State of Indiana; that the said firm owned no real estate, but carried on this business in a rented house; that the stock in trade belonging to the said firm was in due form of law assessed and taxed for State, county, school, township and city purposes for the year 1865; that on the 7th day of August, 1865, Evans and McMillen purchased of Davis his equal one-third interest in the stock of goods and merchandise belonging to the said firm, and in consideration thereof executed the note sued upon; that the said taxes so assessed as aforesaid, were not paid by the said firm, or any member thereof, and became and were delinquent; that on the 18th of August, 1866, the proper officers were about, by distress and sale of the partnership goods, to make the said taxes, with the interest, damages, and costs thereon; and that to prevent such sale they paid the same, amounting in the aggregate to the sum of seven hundred and nine dollars and sixty-two cents; that one-third of said sum, two hun-

dred and thirty-six dollars and seventy-seven cents, was for the taxes upon the interest which the said Davis had sold to them in the said stock of goods; that the principal of the said taxes was due and unpaid when the said Davis so sold his said interest in the stock of goods; and that they were paid by the defendants before the said Davis sold and transferred his interest in the said note to the plaintiff; that the said taxes were paid by, and the receipt was taken in the name of the said firm of Davis, Evans & McMillen, a copy of which was filed with the answer; and that the interest upon the said sum, so paid by them, added to the sum paid, made the said Davis indebted to them in the sum of two hundred and sixty-five dollars and twenty-one cents, which sum they demanded should be a set-off against the said note.

The question presented for our decision is, were the defendants entitled to set off against the note sued on, the amount which they had paid on the taxes of the said Davis, on the stock of goods by him sold to them, and for which the note was given.

The answer shows the following facts: Davis, Evans & McMillen, as partners, owned a stock of goods. Evans and McMillen purchased of Davis his interest in such partnership property, and gave the note in suit. When such purchase was made there was an incumbrance upon the stock of goods, for taxes due and unpaid upon the partnership property. It does not appear that Evans and McMillen purchased any more than Davis' interest in the stock of goods, nor does it appear that they assumed the payment of the partnership debts and liabilities. The taxes constituted a lien upon the partnership property. Davis failed to pay his share of the taxes. The defendants paid all of the taxes, and now ask to set off one-third of the amount against Davis.

Was it the duty of the defendants to pay the taxes and

save the property from being sold? and if they did pay off such incumbrance, can they plead the same as a set-off?

It is well settled that the purchaser of real estate which is encumbered with a mortgage, judgment, or taxes, has the right to discharge such incumbrance without any request from the vendor; and that the sum so paid can be set off against any sum that may be due for the purchase-money; and we are unable to see why the same rule will not apply in a case like this. See *Burk* v. *Clements*, 16 Ind. 132; *Doremus* v. *Bond*, 8 Blackf 368; *Davis* v. *Clements*, 2 Blackf. 3; *Bowles* v. *Newby*, *Id.* 364; *Comparet* v. *Johnson*, 6 Blackf. 59; Waterman on Set-off, 578, and notes.

We think that it was not only the right, but the duty of the defendants to pay such taxes without any request on the part of Davis, and having paid the same, as alleged in the answer, before the assignment of the note, the sum so paid on the one-third interest of Davis, with interest thereon, constituted a valid set-off against the note.

We think the court erred in sustaining a demurrer to the answer.

The conclusion to which we have arrived renders it unnecessary to examine or decide on the other question which has been pressed in argument.

The judgment is reversed, with costs, and the cause remanded, with instructions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

John Green and *D. Waugh*, for appellants.

N. P. Richmond and *D. Moss*, for appellee.

WALLACE v. MILNER.

CREDIBILITY OF WITNESSES.—*Supreme Court.*—The Supreme Court will not, upon the evidence, reverse the finding of the court below, trying an action without the intervention of a jury, where the evidence is conflicting, and its weight must be determined by the credibility of the witnesses.

APPEAL from Marion Circuit Court.

DOWNEY, C. J.—The only question in this case is as to the correctness of the ruling of the circuit court in refusing to grant to the appellant a new trial, which was demanded on the grounds: first, that the damages are excessive; second, because the amount at which the court assessed the value of the property is excessive; third, because the finding and decision of the court is not sustained by sufficient evidence; fourth, because the decision of the court is contrary to law.

The action was brought by the appellee against the appellant, to recover the possession of a horse. The facts are these: Milner owned the horse, and let Fisher and Thompson have him to use for a time for his board. They had him kept at the livery stable of Wood & Mansur, who had a bill against him for his keeping, to the amount of twenty-six dollars, and refused to let him go until the bill had been paid. Fisher and Thompson refused to pay the amount. Milner finding his horse at the livery stable, with the claim for his keeping against him, and not being able to pay the same, made an agreement with Vandever, by which he was to, and did, pay the bill, and take possession of the horse. Vandever sold the horse to Gerton, and he sold him to Wallace. The case turned upon the nature of the contract between Milner and Vandever. Their testimony is conflicting. It was the province of the court trying the case, instead of a jury, to decide upon the credibility of the witnesses. There is some contradiction in the testimony of Milner, itself, but it is not for us to say that the court might not have been justified in believing him, notwithstanding this contradiction, in preference to his adversary.

As to the value of the horse, the witnesses differ very widely in their estimates, ranging from two hundred dollars down to nothing. The court found his value to be seventy-five dollars. We cannot say this was wrong. No damages were assessed by the court.

The judgment is affirmed, with costs.

J. S. Harvey, for appellant.

D. V. Burns, for appellee.

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THE TOWN OF COVINGTON and Others *v.* NELSON.

INJUNCTION.—*Improvement of Streets of Town.—Petition, Ordinance, Contract, Jurisdiction of Board of Trustees.*—Under section 8, 3 Ind. Stat. 128, the board of trustees of a town, have no jurisdiction, without the petition filed of a majority of all the resident owners of lots, &c.; and an ordinance passed and contract made for the improvement of the sidewalks of the town without such petition is void.

SAME.—*Parties.*—Where the work in progress under such void proceeding would be of no benefit, but a damage to the citizens of the town, a resident tax payer of the town may, for himself and others of like interest, enjoin the prosecution of the work.

APPEAL from the Fountain Common Pleas.

BUSKIRK, J.—The suit was brought by Nelson to restrain the making of certain sidewalks in the town of Covington. The complaint alleges, that "Joseph H. Nelson, on behalf of himself and others, who are so numerous that it would be impracticable to make them plaintiffs herein, but who, with the plaintiff, are all *bona fide* residents and tax payers of the town of Covington, and have an interest in the subject-matter of this suit and the relief sought to be enforced, complain" that defendants McManoney and McMahon are proceeding to spread out and distribute gravel on the walks around the lots of divers citizens of said town, and are pre-

paring to do the same around the houses on Liberty, Washington, Jefferson, Harrison, Crockett, Johnson, Pearl, and Commercial streets of said town; also on Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth streets; that said work is being done in pursuance of a pretended contract, a copy of which is filed as exhibit "A;" that said contract is made under an ordinance, a copy of which is filed as exhibit "B," which ordinance, contract, and work are without authority of law, in this, to wit: 1. The said town has never established a grade to regulate the height, depth, or breadth of sidewalks. 2. That two-thirds of the resident owners of real estate, in number or value, have not petitioned for the work. 3. Nor did a majority of all the resident owners on any of said streets petition for the work. 4. The marshal of said town had no authority to contract for the work. 5. The marshal, in making the contract, and the board of trustees in confirming it, "have not exercised that reasonable diligence and care of the property of the citizens imposed upon them by law." 6. The work, if permitted, will be of injury and inconvenience, in this, to wit: "The walks will be, no grade being established, diverse; citizens will have their lots overflowed by reason of the failure to have a drainage sufficient to carry off the water; and the health of residents of the town will be impaired by reason of the water being caused to stagnate, on account of such failure to establish a grade, and putting on of said gravel." 7. That the contract is unjust and will damage plaintiffs, for the reason that the marshal has reserved the right to furnish the gravel, the profit of the same not going to the town of Covington. 8. The board of trustees have not exercised a sound discretion in the passage, or attempt to enforce said ordinance. And that public convenience does not require the work to be done. 9. The work will subject plaintiffs to vexatious litigation; and the work will be of no benefit to the citizens of said town, but of great damage and future cost. 10. The town of Covington has never yet, by ordinance, established a sidewalk, and has "suffered or pre-

tended and attempted to release and exempt certain taxpayers from graveling said sidewalks, to make them abandon opposition to the measure." Prayer for perpetual injunction, enjoining defendants from further proceeding under said ordinance.

The complaint was sworn to.

Exhibit "A" is as follows: Thomas H. B. King, as marshal of said town, let to McManoney and McMahon the constructing of sidewalks in the town of Covington, under an ordinance dated and passed June 7th, 1869; said McManoney and McMahon to construct the same upon the streets and parts of streets, as set forth in said ordinance and designated by a committee of said board. The sidewalks to be constructed of the material required by said ordinance and the notice of letting, and to be paid for at the rate of thirteen and one-eighth cents per foot in length, for gravel walks, and one dollar and twelve and a half cents per foot in length, for brick sidewalks. Dated 12th November, 1869.

Exhibit "B" is the ordinance, and is as follows: "Sec. 1. Be it ordained by the board of trustees of the town of Covington, that the owners of lots adjoining the streets and parts of streets in said town hereinafter named, shall, within ninety days from the taking effect of this ordinance, construct sidewalks thereon, on the parts thereof adjoining their respective lots, in the manner and of the material hereinafter provided.

"Sec. 2. The streets upon which sidewalks are to be constructed are the following, to wit: Liberty, Washington, Jefferson, Harrison, Crockett, Johnson, Pearl, and Commercial streets, commencing at Third street and running east to Tenth street; also Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth streets, commencing at Liberty, and north to Commercial.

"Sec. 3. The sidewalks of that portion of Liberty and Washington, and Third and Fourth streets, which bound the public square, shall be constructed of first class brick, and

shall be twelve feet in width, and the height of grade shall be six inches.

"Sec. 4. The sidewalks on all the above named streets, with the exception contained in section 3, shall be of gravel, and shall be eight feet in width, and six inches height of grade.

"Sec. 5. This ordinance shall be in force from and after its due and legal publication."

To this complaint a demurrer was filed, assigning for cause: First, that there is a defect of parties plaintiffs; second, the court has no jurisdiction of the subject or the parties; third, the complaint does not state facts sufficient to constitute a cause of action.

The court overruled this demurrer, and the defendants excepted.

Upon failure of defendants to answer over, the court found for the plaintiffs, and rendered judgment, perpetually enjoining the town of Covington from paying any money for work done under said ordinance, and the other defendants from prosecuting said work.

The correctness of the ruling of the court in overruling the demurrer to the complaint is the only question presented for our decision. The first cause of demurrer was, that there was a defect of parties plaintiffs. We think that the facts stated in the complaint are sufficient to authorize Joseph H. Nelson to prosecute the suit in his name for himself and on behalf of all others who are affected by the acts of the appellees. The complaint was certainly good as to Nelson.

The second cause of demurrer was, that the court had no jurisdiction of the subject-matter or of the parties. There is nothing in this objection. 2 G. & H., secs. 136, 137, pp. 131, 132, expressly confer jurisdiction on the common pleas court.

The third cause of demurrer was, that the complaint did not state facts sufficient to constitute a cause of action.

The complaint contains ten specific causes why an in-

junction should be granted. The demurrer admits the truth of these allegations. The second and third causes are, 2d, That two-thirds of the resident owners of real estate, in number or in value, have not petitioned for the work. 3d, Nor did a majority of all the residents on any of the said streets petition the trustees to make the said improvement.

Section 8 (3 Ind. Stat. 128) provides, that "whenever a majority of all the resident owners of any lots or parcels of land on any street or alley, not less than one square, to be estimated by numbers, or by measuring the front lines of such lots or parcels of land bordering thereon, shall petition the board of trustees of said town to grade, pave, gravel, or macadamize, or for either kind of said improvements, the board of trustees may cause the same to be done according to the specifications by them to be adopted, by contracts given to the best bidder, after advertising to receive proposals therefor."

The filing of the petition was necessary to confer jurisdiction upon the board of trustees. Without such petition, they had no power to pass the ordinance, or to make any contract in reference to the improvement of the said streets. Their whole action in the premises was absolutely void. It is not necessary to examine the other causes assigned for the injunction. The injunction was properly granted.

The judgment is affirmed, with costs.

T. F. Davidson, for appellants.

S. F. Wood and — *McWilliams*, for appellee.

BROOKER v. HETZELGESSER.

PLEADING.—*Evidence.*—In a suit on a promissory note before a justice, where the general denial was waived, and it was answered that the note was given for a field of corn falsely and fraudulently represented by the payee of the note to contain twenty acres of good corn, fifteen acres being first quality and five acres soft, fair corn, which representations were relied upon by the defendant, whereas, in fact, but ten acres of said corn were of any value;

Held, that evidence that the payee of the note had gathered and removed ten acres of the corn without the defendant's knowledge, before the sale, was inadmissible under the answer.

APPEAL from the Marion Common Pleas.

DOWNEY, C. J.—Suit by the appellee against the appellant, commenced before a justice of the peace, on two promissory notes, executed by the defendant to one Wiggs, and by him indorsed to the plaintiff.

The answer of the defendant, in the first paragraph, waives the general denial put in by statute, and alleges that before the bringing of the suit he fully paid to the payee and assignor, Wiggs, the notes. For a second paragraph, he says that the notes were given for a certain field of corn, falsely and fraudulently represented by the payee to contain twenty acres of good corn, fifteen of which were falsely and fraudulently represented by said Wiggs to be first class and good corn, and five acres to be soft, fair corn; that defendant, relying on said representations so made by Wiggs, executed the notes to him; that there were but ten acres of said corn that was of any value whatever to this defendant; wherefore, &c.

The reply was the general denial. There was a trial by jury; verdict and judgment for the plaintiff; motion for a new trial overruled, and exception taken.

Several errors are assigned, but they are all embraced in the one that the court erred in refusing to grant the new trial asked.

The defendant offered to prove that prior to the sale of the corn to him, Wiggs had entered, gathered, and carried

away ten acres of the corn, which fact was unknown to the defendant when he purchased. This evidence was rejected by the court, because the same was not admissible under the pleading.

The court instructed the jury that the allegations of the second paragraph of the answer had no reference to the quantity of the corn, but only to its quality. We think these rulings were correct. The paragraph of the answer in question is not very perspicuous, but we understand it to allege only that there were but ten acres of the corn that was of any value to the defendant. This is not an allegation that there were but ten acres of the corn. Hence we think there was no question as to the quantity of corn. The evidence offered might have been given without any answer, under section 34, p. 585, 2 G. & H., had not the defendant expressly waived this right, which we suppose he had the power and right to do.

The court also charged the jury, that if the defendant had an opportunity to examine the corn and ascertain whether or not there was any defect in the quality of it, and he gathered, removed, and used it without making any complaint of its quality or notifying those from whom he bought it of any defect, the plaintiff would be entitled to recover.

The corn was sold and the notes executed on the 9th day of October, 1868, and this suit was not brought until September, 13th, 1869. The evidence given in the cause is not set out in the bill of exceptions. We cannot say that there was any error in giving this instruction.

The judgment is affirmed, with costs.

D. V. Burns, for appellant.

J. Klingensmith, for appellee.

MILLER v. REMLEY.

MORTGAGE.—*Foreclosure.*—Where a mortgage is executed to secure the payment of several promissory notes when they shall become due, it may be foreclosed upon non-payment, when due, of any of the notes.

APPEAL from the Warren Circuit Court.

DOWNEY, C. J.—This was an action by the appellee against the appellant to foreclose a mortgage to secure the payment of four notes, when they should become due. The language is "to secure the payment, when they shall become due, of four promissory notes, bearing even date herewith," &c.

It is insisted by the appellant that there could be no foreclosure of the mortgage until all the notes were due, and that as only two of the notes were due when the suit was brought, the action was prematurely brought. This is the only point. This exact question was decided by this court, against the position of the appellant, in *Hunt* v. *Harding*, 11 Ind. 245.

The judgment is affirmed, with five per cent. damages and costs.

J. H. Brown, for appellant.

J. M. Butler, for appellee.

JOHN v. THE CINCINNATI, RICHMOND, AND FORT WAYNE RAILROAD COMPANY and Another.

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156 166

CONSTITUTIONAL LAW.—*Subscriptions to Railroads.—Townships.—Taxes.*—The State may make internal improvements, directly, or by a corporation, and for that purpose, levy and collect taxes, or empower counties and townships to do so and subscribe and pay for stock in a railroad company.

SAME.—The act, approved May 12th, 1869, "to authorize aid to the construction of railroads, by counties and townships taking stock in," &c., contemplates a payment for stock at the time of subscription, and not the creation of a debt therefor, and is constitutional.

APPEAL from Wayne Common Pleas.

WORDEN, J.—This was a complaint by the appellant against the appellees, to restrain the collection of a certain tax levied for the purpose of enabling Wayne township, in said county, to aid in the construction of the above named railroad, by subscribing for stock therein.

Demurrer sustained to the complaint, exception, and final judgment for defendants.

The only question made in the cause related to the validity of the act of the legislature of May 12th, 1869, "to authorize aid to the construction of railroads, by counties and townships taking stock in and making donations to railroad companies," so far as the act authorizes townships to thus take stock, to be paid for by means of levying a tax upon the property of the township, as in the act is provided for.

The constitutionality of the act in question was so fully considered and discussed by this court in the case of *The Lafayette, Muncie, and Bloomington Railroad Company* v. *Geiger*, 34 Ind. 185, that but little need be said in addition to what is to be found in the opinion in that case. That was a tax for a county subscription; this for a township subscription. Both are authorized by the law in question. The law was held, in the case above mentioned, to be valid so far as it authorized county subscriptions, and it remains to inquire whether there is any substantial difference between a county and a township subscription, so far as the validity of the law is concerned.

Long before the adoption of our present constitution, townships, as corporations, were known and established. R. S. 1838, p. 596; R. S. 1843, p. 91. They are recognized as such in various provisions of that instrument, as in sections 3, 6, and 7, of article 6, and section 14 of article 7. There seems to be no good reason, constitutionally, why the lesser corporation, territorially, of a township, may not be authorized to aid a railroad company by subscribing for stock therein, as well as the greater corporation of a county.

We take for granted, as a postulate, upon which to found all reasoning on the subject, that the State may lawfully construct roads, canals, or other descriptions of internal improvement, in order to facilitate the social and business intercourse of the people, and to develop its resources and add to its strength, security, and prosperity.

The means of transportation and inter-communication ought to, and in a very great measure will, keep pace with the knowledge, experience, the wants and necessities of the age. Only a few years ago the common roads of the country, with a greater or less degree of improvement, and our navigable rivers and lakes, together with the artificial water carriage afforded by canals, were the only means of transportation or intercourse known to the people of this country. Of so much importance were our lakes and navigable rivers, that it was formerly supposed no considerable inter-oceanic city could be built except upon their banks. But since the era of railroads all this is changed. Lake, river, and canal navigation is, in a great measure, superceded by them, and towns and cities spring up and prosper at points entirely unaided by natural facilities for transportation; the resources of the country are being developed, and the wealth of the State increased, to an extent unrealized heretofore. In taking a retrospect of the last twenty-five years, and considering the rapid development of our State within that time, in wealth, population, and resources, we can hardly fail to see that the railroad has had much to do with this development. All this has, perhaps, little to do with the question before us, but it may vindicate the wisdom of the legislature in keeping pace with the necessities of the age, and fostering a system of railroads.

The means of transportation and inter-communication being one of the legitimate objects of government, it follows that the legislature may adopt a choice of means, unless restrained by the constitution; they may adopt such as they think will best subserve the purpose intended; they may build railroads, or canals, or turnpikes, or all of them.

The constitution, which vests the legislative authority of the State in the General Assembly, is ample for this purpose. Const. art. 4, sec. 1.

The State being authorized to build railroads, it follows that it may levy a tax, in accordance with the provisions of the constitution, for that purpose. It would be paradoxical to say that the legislature have power to do a given thing, and at the same time say that they have not the power to provide the necessary means for that purpose. The constitution, vesting the legislative authority of the State in the general assembly, is ample authority also for this purpose. The taxing power is legislative in its character, and as such is fully vested in the general assembly, subject to such restrictions as are contained in the constitution. Taxation is perhaps the most universal power possessed by goverments, and may always be resorted to when necessary to carry out any other power granted to the legislature.

As the State may build railroads, and for that purpose levy and collect taxes, the question arises whether she must do it directly through her own employees, or whether she may avail herself for that purpose of a railroad corporation. On both principle and authority she may do the latter. She must necessarily have a choice of means to the accomplishment of the end. The end, so far as the State is concerned, is the furnishing to her citizens of the means of transportation and inter-communication. It is no answer to this to say that the object and end of the railroad company which undertakes the building of the road is the private profit of the company or the corporators. If the corporation builds and operates a railroad, and complies with the law regulating her conduct, the object of the State in respect to the given road is accomplished; the facilities of travel and transportation are furnished. The people along the line of the road who are taxed for the stock subscribed by them, and who can be taxed only on a vote of their own, realize the benefits expected by them, and the State has discharged her duty to them by furnishing the necessary facilities.

Perhaps this is not the most judicious system that could be adopted, on the part of the State, for furnishing her citizens the necessary facilities for travel and transportation, but we are of opinion that the legislature, in adopting it, have not transcended their constitutional authority. Something may, however, be said in vindication of its policy. While the leading and main lines of railroads would, perhaps, invite sufficient capital for their construction, without a resort to taxation by counties or townships for the purpose of subscriptions, yet there are many others, less important and shorter, that could not be built without such local aid as is provided for by the law in question, and which are of great importance and convenience to those living along their lines, and which, when constructed and in operation, confer benefits more than equivalent to the aid furnished.

It is not, however, our province to pass upon the wisdom or policy of the law, but simply its constitutionality. It contemplates a payment for the stock at the time of subscription, and not the creation of any debt therefor, and we think it constitutional and valid.

The judgment below is affirmed, with costs.

W. A. Peelle, C. H. Burchenal, and *H. C. Fox,* for appellant.

J. P. Siddall, for appellees.

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